(16)

No. 00-795-CFX Title: John D. Ashcroft, Attorney General, et al., Petitioners
v.
The Free Speech Coalition, et al.

Docketed:
November 17, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Oct 6 2000	Application (00A302) to extend the time to file a petition for a writ of certiorari from October 17, 2000 to November 16, 2000, submitted to Justice O'Connor.
	Oct 10 2000	Application (00A302) granted by Justice O'Connor extending the time to file until November 16, 2000.
	Nov 16 2000	Petition for writ of certiorari filed. (Response due December 17, 2000)
	Dec 18 2000	Brief of respondents The Free Speech Coalition, et al. in opposition filed.
	Jan 3 2001	DISTRIBUTED for Conference of January 19, 2001
	Jan 4 2001	Reply brief of petitioners Janet Reno, Attorney General, et al. filed.
	Jan 22 2001	Petition GRANTED. SET FOR ARGUMENT October 30, 2001. **********
	Mar 6 2001	Order extending time to file petitioners' brief on the merits to and including April 23, 2001.
	Mar 6 2001	Motion of Morality in Media, Inc., for leave to file a brief as amicus curiae filed.
	Mar 7 2001	Motion of Sam Brownback, et al. for leave to file a brief as amici curiae filed.
	Mar 16 2001	Motion of Morality in the Media, Inc. for leave to file a brief as amicus curiae DISTRIBUTED.
	Mar 16 2001	Motion of Sam Brownback, et al. for leave to file a brief as amicus curiae DISTRIBUTED.
	Mar 19 2001	Motion of Morality in Media, Inc., for leave to file a brief as amicus curiae GRANTED.
	Mar 19 2001	Motion of Sam Brownback, et al. for leave to file a brief as amici curiae GRANTED.
	Apr 23 2001	Motion of National Center for Missing & Exploited Children for leave to file a brief as amicus curiae filed.
	Apr 23 2001	Motion of National Law Center for Children and Families, et al. for leave to file a brief as amici curiae filed.
	Apr 23 2001	Brief amici curiae of New Jersey, et al. filed.
	Apr 23 2001	Brief of petitioners John D. Ashcroft, Attorney General, et al. filed.
	Apr 23 2001	Motion of National Legal Foundation for leave to file a brief as amicus curiae filed.
	Apr 30 2001	Motion of National Center for Missing & Exploited Children for leave to file a brief as amicus curiae GRANTED.
	Apr 30 2001	Motion of National Law Center for Children and Families, et al. for leave to file a brief as amici curiae GRANTED.

2pp

No. 00-795-CFX

Entry	Date	Proceedings and Orders
	May 10 2001	Motion of National Legal Foundation for leave to file a brief as amicus curiae DISTRIBUTED.
	May 14 2001	Motion of National Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	May 15 2001	Order extending time to file respondents' brief on the merits to and including July 2, 2001.
	Jun 28 2001	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Jul 2 2001	Brief amicus curiae of Liberty Project filed.
	Jul 2 2001	Brief of respondent The Free Speech Coalition, et al. filed.
	Jul 2 2001	Brief amici curiae of Association of American Publishers, Inc., et al. filed.
	Jul 30 2001	Application (01A91) for an extension of time to file petitioners' reply brief on the merits, submitted to Justice O'Connor.
	Jul 31 2001	Application (01A91) granted by Justice O'Connor extending the time to file until August 20, 2001.
	Aug 3 2001	Motion of the Solicitor General to dispense with printing the joint appendix filed.
	Aug 14 2001	CIRCULATED.
	Aug 16 2001	LODGING consisting of twenty copies of magazine references submitted by counsel for amici Natl. Law Center for Children and Families, et al. and distributed.
	Aug 20 2001	Reply brief of petitioners Janet Reno, Attorney General, et al. filed.
	Aug 27 2001	Record filed.
	Sep 5 2001	Record filed.
	Sep 7 2001	Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
	Oct 30 2001	ARGUED.

Supreme Court, U.S.
FILED

00 795 NOV 16 2000

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

THE FREE SPEECH COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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101 pp

QUESTION PRESENTED

The Child Pornography Prevention Act of 1996, prohibits, *inter alia*, the shipment, distribution, receipt, reproduction, sale, or possession of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(B) (Supp. IV 1998). It also contains a similar prohibition concerning any visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(D) (Supp. IV 1998). The question presented is whether those prohibitions violate the First Amendment to the Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners are Janet Reno, Attorney General of the United States, and the United States Department of Justice. Respondents are The Free Speech Coalition, Bold Type, Inc., Jim Gingerich, and Ron Raffaelli.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	12
Conclusion	20
Appendix A	1a
Appendix B	44a
Appendix C	50a
Appendix D	66a
Appendix E	67a

TABLE OF AUTHORITIES

Cases:

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	20
Ginzburg v. *United States*, 383 U.S. 463 (1966)	17
Miller v. *California*, 413 U.S. 15 (1973)	18
New York v. *Ferber*, 458 U.S. 747 (1982)	9, 12, 15, 17, 18, 19, 20
Osborne v. *Ohio*, 495 U.S. 103 (1990)	10, 16, 17
Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997)	16
United States v. *Acheson*, 195 F.3d 645 (11th Cir. 1999)	13, 14
United States v. *Gainey*, 380 U.S. 63 (1965)	13
United States v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 120 S. Ct. 115 (1999)	10, 11, 13, 14, 17, 18, 19, 20
United States v. *Mento*, No. 99-4813, 2000 WL 1648878 (4th Cir. Nov. 3, 2000)	13, 14

Constitution and statute:

U.S. Const. Amend. I	2, 8, 9, 13, 15, 16, 17, 19

Statute—Continued: Page

Child Pornography Prevention Act of 1996, 18 U.S.C. 2251 *et seq.*:
18 U.S.C. 2251 (Supp. IV 1998) 3, 4, 5, 6, 16, 17, 67a
18 U.S.C. 2252(a)(1)(A) 2
18 U.S.C. 2252(a)(4)(B)(i) 2
18 U.S.C. 2252A (Supp. IV 1998) 12, 71a
18 U.S.C. 2252A(a) (Supp. IV 1998) 3, 71a
18 U.S.C. 2252A(a)(1)-(5) (Supp. IV 1998) 18, 71a-72a
18 U.S.C. 2252A(b)(1) (Supp. IV 1998) 7, 73a
18 U.S.C. 2252A(b)(2) (Supp. IV 1998) 7, 73a
18 U.S.C. 2252A(c) (Supp. IV 1998) 6, 19, 73a-74a
18 U.S.C. 2252A(d) (Supp. IV 1998) 7, 74a
18 U.S.C. 2256(1) 3
18 U.S.C. 2256(2) 3, 75a
18 U.S.C. 2256(8)(A) (Supp. IV 1998) 3, 75a
18 U.S.C. 2256(8)(B) (Supp. IV 1998) 3, 12, 75a
18 U.S.C. 2256(8)(C) (Supp. IV 1998) 3, 75a
18 U.S.C. 2256(8)(D) (Supp. IV 1998) 3, 12, 17, 75a-76a

Miscellaneous:

Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess. (1996) 3, 5, 6
S. Rep. No. 358, 104th Cong., 2d Sess. (1996) 4, 5, 17

In the Supreme Court of the United States

No.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

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THE FREE SPEECH COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States and the United States Department of Justice, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-43a) is reported at 198 F.3d 1083. The opinion of the district court (App., *infra*, 50a-66a) is unreported. The order denying rehearing (App., *infra*, 44a-49a) is reported at 220 F.3d 1113.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1999. A petition for rehearing was denied on July 19, 2000. App., *infra*, 44a. On October 10, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 16, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The pertinent provisions of the Child Pornography Prevention Act are reprinted in an appendix to this petition. App., *infra*, 67a-76a.

STATEMENT

For almost two decades, federal law has prohibited the production and distribution of child pornography. Before the enactment of the Child Pornography Prevention Act of 1996 (CPPA), the prohibitions applied only to visual depictions of real children engaged in sexually explicit conduct. See, *e.g.*, 18 U.S.C. 2252(a)(1)(A) and (4)(B)(i). Responding to concerns raised by advances in computer technology, the CPPA extends the prohibitions relating to child pornography to visual depictions of children engaged in sexually explicit conduct, regardless of whether real children are involved in the production of those images. The provisions of the CPPA that effect that extension are at issue here.

1. a. The CPPA prohibits the knowing shipment, receipt, distribution, reproduction, sale, or possession of

child pornography. 18 U.S.C. 2252A(a) (Supp. IV 1998). In provisions that are not at issue here, the CPPA defines child pornography to include any visual depiction that involves the use of a minor engaging in sexually explicit conduct, or that has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.[1] 18 U.S.C. 2256(8)(A) and (C) (Supp. IV 1998). In the provisions at issue here, the CPPA further defines child pornography to include: (1) any visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(B) (Supp. IV 1998); and (2) any visual depiction that "is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(D) (Supp. IV 1998).

b. Congress enacted into law in the CPPA 13 legislative findings that explain the reasons that Congress broadened the prohibitions relating to child pornography. 18 U.S.C. 2251 note (Supp. IV 1998) (Congressional Findings). Those findings are drawn from information presented in congressional hearings on the subject of child pornography. *Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. 35 (1996) (*Senate Hearing*). The Senate Report accom-

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[1] The CPPA defines "sexually explicit conduct" as "actual or simulated - (A) sexual intercourse * * * ; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2). "Minor" is defined as "any person under the age of eighteen years." 18 U.S.C. 2256(1).

panying the CPPA also illuminates the basis for the CPPA. S. Rep. No. 358, 104th Cong., 2d Sess. (1996).

In its statutory findings, Congress determined that "new photographic and computer imagin[g] technologies make it possible to produce * * * visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 5). Congress also found that, even when actual children are used, computers can "alter sexually explicit [depictions] in such a way as to make it virtually impossible * * * to identify individuals, or to determine if the offending material was produced using children." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 6(A)). Congress found those technological developments extraordinarily troubling for several reasons.

First, Congress determined that "child pornography is often used as part of a method of seducing other children into sexual activity." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 3). In particular, "a child who is reluctant to engage in sexual activity with an adult * * * can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 3). Congress determined that computer-generated images of children engaged in sexually explicit conduct can be just as effective in seducing children into sexual activity as photographic images of real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 8).

Second, Congress found that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites" and that "such use of child pornography can desensitize the

viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 4). Congress found that child pornography can have those pernicious effects, regardless of whether the pornography takes the form of computer-generated images or photographs of real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 8).

Third, Congress was concerned that advancing technology could render unenforceable the prohibitions against the distribution and possession of child pornography involving real children. As explained in the Senate Report:

> As the technology of computer-imaging progresses, it will become increasingly difficult, if not impossible, to distinguish computer-generated from photographic depictions of child sexual activity. It will therefore become almost impossible for the Government to meet its burden of proving that a pornographic image is of a real child. Statutes prohibiting the possession of child pornography produced using actual children would be rendered unenforceable and pedophiles who possess pornographic depictions of actual children will go free from punishment.

S. Rep. No. 358, *supra*, at 20.

Fourth, Congress heard evidence that computer-generated images of children engaged in sexually explicit conduct are often exchanged for pictures of real children engaged in such conduct. *Senate Hearing* 20, 23, 30, 35, 90. Congress learned that, because of that phenomenon, the production and distribution of computer-generated child pornography helps to sustain

the market for the production of visual depictions that involve real children. *Id.* at 91.

Based on those considerations, Congress concluded that there are "compelling" governmental interests in eliminating child pornography that takes the form of computer-generated images of children engaged in sexual activity. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 13). Those compelling interests are implicated, Congress concluded, when the computer-generated images of children engaged in sexual activity "are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 13).

c. The CPPA establishes affirmative defenses that limit the reach of the Act. The CPPA provides an affirmative defense to a charge of unlawful shipment, receipt, distribution, reproduction, or sale of child pornography if the defendant can show that "(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; (2) each such person was an adult at the time the material was produced; and (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(c) (Supp. IV 1998). In addition, as amended in 1998, the CPPA provides an affirmative defense to a charge of possession of child pornography if the defendant can show that he "(1) possessed less than three images of child pornography; and (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—(A) took reasonable steps

to destroy each such image; or (B) reported the matter to a law enforcement agency and afforded that agency access to each such image." 18 U.S.C. 2252A(d) (Supp. IV 1998).

A conviction on a charge relating to the shipment, receipt, distribution, reproduction, or sale of child pornography carries a maximum penalty of 15 years' imprisonment, unless the defendant has a prior conviction relating to child pornography, in which case the sentence shall be no less than five years' imprisonment and no more than 30 years' imprisonment. 18 U.S.C. 2252A(b)(1) (Supp. IV 1998). A conviction on a charge of possession of child pornography carries a maximum penalty of five years' imprisonment, unless the defendant has a prior conviction relating to child pornography, in which case the sentence shall be no less than two years' imprisonment and no more than ten years' imprisonment. 18 U.S.C. 2252A(b)(2) (Supp. IV 1998).

2. After the CPPA was signed into law, the Free Speech Coalition and others (respondents) filed suit in the Northern District of California against the Attorney General and the Department of Justice seeking to invalidate certain provisions of the CPPA. App., *infra*, 3a. The Free Speech Coalition is a trade association of businesses involved in the production and distribution of "adult-oriented materials"; the other respondents are a publisher of a book on nudism, an artist who paints nudes, and a photographer who specializes in erotic photography. *Ibid.* Respondents alleged that the CPPA is vague, overbroad, and an impermissible prior restraint on their speech to the extent that it applies to visual depictions that do not involve actual children. *Id.* at 50a, 54a.

On cross-motions for summary judgment, the district court upheld the constitutionality of the Act. App., *infra*, 50a-66a. The court held that the Act should be evaluated under intermediate First Amendment scrutiny, because it is designed to counteract the effect that child pornography has on innocent children and is not intended to outlaw the ideas themselves. *Id.* at 58a. The court concluded that the Act readily satisfies intermediate scrutiny. *Id.* at 59a-62a. The court determined that the CPPA "clearly advances important and compelling government interests: the protection of children from the harms brought on by child pornography and the industry that such pornography has created." *Id.* at 58a. The court also determined that "the CPPA burdens no more speech than necessary in order to protect children from the harms of child pornography. *Id.* at 59a.

The district court also held that the Act is not overbroad. App., *infra*, 63a. The court found that, under a fair reading of the CPPA's prohibitions and its affirmative defenses, it is "highly unlikely" that the Act would prevent the production of "valuable works." *Id.* at 62a-63a.

The court also held that the CPPA is not unconstitutionally vague. App., *infra*, 63a-64a. The court explained that the Act "clearly and specifically defines the prohibited conduct as the depiction of children—engaged in sexually explicit conduct." *Id.* at 63a. Finally, the court concluded that, because the CPPA does not require advance approval for production or distribution of sexually explicit materials, it does not constitute an improper prior restraint on speech. *Id.* at 65a.

3. The court of appeals reversed. App., *infra*, 1a-43a. The court held that "the phrases 'appears to be' a

minor, and 'convey[s] the impression' that the depiction portrays a minor, are vague and overbroad and thus do not meet the requirements of the First Amendment." *Id.* at 2a.

a. Finding that the CPPA restricts speech based on its content, the court of appeals held that the CPPA can survive First Amendment scrutiny only if the government can show that it is narrowly tailored to further a compelling interest. App., *infra*, 14a-15a. Relying on *New York* v. *Ferber*, 458 U.S. 747 (1982), the court further held that government has a compelling interest in regulating child pornography only when its goal is "the protection of the actual children used in the production of child pornography." App., *infra*, 17a. Applying that understanding of *Ferber*, the court held that the government's interests in preventing pedophiles from using child pornography to seduce children into sexual activity and to stimulate their sexual appetites are not compelling. In particular, the court stated that "any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions." *Id.* at 19a. The court also concluded that there is not a demonstrated link between computer-generated child pornography and the subsequent sexual abuse of children. *Id.* at 20a.

The court of appeals next held that the CPPA is unconstitutionally vague. App., *infra*, 23a-24a. It concluded that the phrases "appears to be" and "convey[s] the impression" are "highly subjective" and that a person of ordinary intelligence "could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution." *Id.* at

24a. The court declined to follow the First Circuit's holding in *United States* v. *Hilton*, 167 F.3d 61, cert. denied, 120 S. Ct. 115 (1999), that the CPPA is not unconstitutionally vague. App., *infra*, 23a.

Again disagreeing with the First Circuit's decision in *Hilton*, the court also held that the CPPA is unconstitutionally overbroad. App., *infra*, 25a-27a. The court reiterated its earlier conclusion that Congress may regulate child pornography only in order to prevent the harm caused to children involved in its production. *Id.* at 26a. And the court concluded that "the CPPA is insufficiently related" to that interest "to justify its infringement of protected speech." *Ibid.*

b. Judge Ferguson dissented. App., *infra*, 29a-43a. Judge Ferguson disagreed with the majority's holding "that preventing harm to depicted children is the only legitimate justification for banning child pornography." *Id.* at 32a. He concluded that, under *Osborne* v. *Ohio*, 495 U.S. 103 (1990), Congress has a legitimate interest in prohibiting the dissemination of images that can be used to seduce children into sexual activity, and in destroying the child pornography market. App., *infra*, 32a-33a. Judge Ferguson also criticized the majority for failing to recognize that advances in computer-imaging technology are threatening to undermine the government's ability to enforce existing child pornography prohibitions. *Id.* at 34a-35a. Judge Ferguson concluded that "Congress' interests in destroying the child pornography market and in preventing the seduction of minors outweigh virtual child pornography's exceedingly modest social value." *Id.* at 37a-38a.

Judge Ferguson also concluded that the CPPA is not overbroad. App., *infra*, 38a-41a. Because the Act targets only those images that are "indistinguishable"

from photographic images of actual children, the Act does not, in his view, reach "everyday artistic expressions like paintings, drawings, and sculptures that depict youthful looking subjects in a sexual manner." *Id.* at 39a. Judge Ferguson also noted that an affirmative defense shields photographic images of youthful-looking adults in sexual poses, so long as they are not marketed as child pornography. *Id.* at 40a. Any possible impermissible applications of the CPPA, Judge Ferguson explained, should be resolved on a case-by-case basis. *Id.* at 40a-41a.

Finally, Judge Ferguson concluded that the CPPA is not unconstitutionally vague. App., *infra*, 41a-43a. As he read the Act, the inquiry into whether an image appears to be a minor is an objective one: The question is "whether an unsuspecting viewer would consider the depiction to be an actual individual under the age of eighteen engaging in sexual activity." *Id.* at 42a (quoting *Hilton*, 167 F.3d at 75). Judge Ferguson also pointed out that the CPPA's scienter requirement provides an additional safeguard against arbitrary enforcement. *Id.* at 42a-43a.

c. The government's petitions for rehearing and rehearing en banc were denied. App., *infra*, 44a-45a. Judge Ferguson would have granted rehearing and recommended granting the suggestion for rehearing en banc. *Id.* at 44a.

Judge Wardlaw (joined by Judges O'Scannlain and T.G. Nelson) dissented from the denial of rehearing en banc, App., *infra*, 45a-49a, observing that the panel decision "creates a conflict with our sister circuits on an issue of exceptional importance," *id.* at 45a. Judge Wardlaw faulted the panel majority for failing to recognize that the CPPA is supported by at least two compelling interests: the interest in preventing ped-

philes from using child pornography to seduce children into sexual activity, and the interest in effectively enforcing the prohibitions against the production of visual depictions involving real children. *Id.* at 46a-47a. Finally, Judge Wardlaw faulted the majority for dismissing congressional findings concerning the danger to real children from rapidly advancing computer technology. *Id.* at 48a-49a.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case invalidated as unconstitutional two critical provisions of the Child Pornography Prevention Act. That constitutional ruling squarely conflicts with decisions of the First, Eleventh, and Fourth Circuits. It is also incorrect. The provisions of the CPPA invalidated by the court of appeals constitutionally advance the government's compelling interest in the "prevention of sexual exploitation and abuse of children." *New York* v. *Ferber*, 458 U.S. 747, 757 (1982). Review by this Court is clearly warranted.

A. The court of appeals in this case invalidated two key provisions of the CPPA. The first prohibits the dissemination and possession of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(B) (Supp. IV 1998). The second prohibits the dissemination and possession of any visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(D) (Supp. IV 1998). Those two provisions are designed to address the serious dangers to children posed by computer-generated child pornography.

The court of appeals definitively held those two provisions unconstitutional. It expressly concluded that "the phrases 'appears to be' a minor, and 'convey[s] the impression' that the depiction portrays a minor, are vague and overbroad and thus do not meet the requirements of the First Amendment." App., *infra*, 2a. The court of appeals' invalidation of two critical provisions of a recent Act of Congress clearly warrants this Court's review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress").

B. Review is also warranted because the court of appeals' constitutional ruling conflicts with decisions of the First, Eleventh, and Fourth Circuits. *United States* v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 120 S. Ct. 115 (1999); *United States* v. *Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States* v. *Mento*, No. 99-4813, 2000 WL 1648878 (4th Cir. Nov. 3, 2000). All three circuits have upheld the constitutionality of the CPPA, rejecting identical First Amendment challenges.

In *Hilton*, a defendant charged with unlawful possession of computer disks containing child pornography challenged the constitutionality of the CPPA on its face. The First Circuit rejected that facial challenge, ruling that the Act "neither impinges substantially on protected expression nor is so vague as to offend due process." 167 F.3d at 65. It held that the Act's coverage of material that appears to be of a minor engaged in sexually explicit conduct is supported by the government's compelling interest in "safeguarding the welfare of children," *id.* at 73, and that "[w]hatever overbreadth may exist at the edges [is] more appropriately cured through a more precise case-by-case evaluation of the facts in a given case." *Id.* at 74.

The First Circuit also refused "to strike down the CPPA as unconstitutionally vague," finding that "[t]he language of the statute affords an ordinary consumer of sexually explicit material adequate notice of the kinds of images to avoid." *Id.* at 76-77.

In *Acheson*, a defendant charged with receipt and possession of more than 500 computer images of child pornography challenged the facial validity of the CPPA. Like the First Circuit, the Eleventh Circuit rejected overbreadth and vagueness challenges to the statute, concluding that "the legitimate scope of the statute dwarfs the risk of impermissible applications," 195 F.3d at 652, and that the "statute puts a reasonable person on notice as to what conduct is prohibited and provides adequate protection against arbitrary enforcement," *id.* at 653.

Most recently, in *Mento*, the Fourth Circuit likewise rejected a facial challenge to the CPPA. It ruled that the "appears to be" and "conveys the impression" provisions are supported by the government's "compelling" interest in protecting "all children from sexual exploitation resulting from child pornography." 2000 WL 1648878, at *4. The Fourth Circuit held that the CPPA "does not burden substantially more material than necessary to further" that interest. *Id.* at *7. And it concluded that "the CPPA provides clear and adequate notice of the activity it regulates, such that ordinary citizens and those charged with enforcing the law may readily understand what is prohibited." *Ibid.*

The Ninth Circuit's decision in this case is irreconcilable with the First Circuit's decision in *Hilton*, the Eleventh Circuit's decision in *Acheson*, and the Fourth Circuit's decision in *Mento*. That conflict among the courts of appeals on the constitutionality of an Act of Congress warrants resolution by this Court.

C. Finally, review is warranted because the court of appeals erred in holding that the provisions at issue here are unconstitutional. Those provisions constitutionally advance the government's compelling interest in the "prevention of sexual exploitation and abuse of children." *Ferber*, 458 U.S. at 757. The court of appeals' compelling interest, vagueness, and overbreadth rulings are all deeply flawed.

1. a. The court of appeals read this Court's decision in *Ferber* to hold that the government has a compelling interest in regulating child pornography only when its goal is "the protection of the actual children used in the production of child pornography." App., *infra*, 17a. Based on that understanding of *Ferber*, the court of appeals held that the government's interests in preventing pedophiles from using child pornography to seduce children into sexual activity and to stimulate their own sexual appetites are not compelling. *Id.* at 19a. The court of appeals' understanding of *Ferber* is simply incorrect.

The prohibition against the dissemination of child pornography at issue in *Ferber* was designed to prevent the harm to children who become involved in the production of child pornography. In sustaining the validity of that prohibition against a First Amendment challenge, however, the Court did not purport to restrict the government to pursuing that interest alone. The Court instead identified the relevant compelling interest supporting the suppression of child pornography as the "prevention of sexual exploitation and abuse of children." *Ferber*, 458 U.S. at 757. That more general interest extends to all children who may be abused as a result of the dissemination of visual depictions of child pornography, not just children who are actually involved in the production of such material.

Osborne v. *Ohio*, 495 U.S. 103 (1990), further demonstrates that the government is not limited to protecting children involved in pornographic depictions. In that case, the Court sustained the constitutionality of a prohibition against the possession and viewing of child pornography. The Court expressly held that one state interest supporting that prohibition was preventing pedophiles from using pictures of child pornography to seduce other children into sexual activity. *Id.* at 111.

Under *Ferber* and *Osborne*, the government's interests in preventing pedophiles from using child pornography to seduce children into sexual activity and to stimulate their sexual appetites are compelling and fully justify the provisions at issue here. That is particularly true in light of Congress's specific finding that computer-generated images of child pornography can be used for those purposes just as effectively as pictures of real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 8).[2]

b. Even if we assume, *arguendo*, that protecting children who participate in the production of child pornography is the only interest that may be considered in the First Amendment analysis, that interest is directly implicated here. Congress found that advancing technology makes it increasingly difficult, if not impossible, to distinguish computer-generated from

[2] The court of appeals determined that there is not a demonstrated link between computer-generated child pornography and the subsequent sexual abuse of children. App., *infra*, 20a. Following hearings on the subject, however, Congress expressly determined that such a link exists. 18 U.S.C. 2251 note (Supp. IV 1998) (Findings 3, 4, 8, 9, and 10). The court of appeals had no basis for disregarding that congressional judgment. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195-196 (1997).

photographic depictions of children engaged in sexual activity. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 6(A)); S. Rep. No. 358, *supra*, at 20. As a consequence, the government may find it impossible in many cases to prove that a pornographic image is of a real child. *Ibid.* The prohibitions at issue here ensure that people who disseminate or possess pornographic depictions of actual children will not escape punishment in those circumstances.

In addition, computer-generated images of children engaged in sexually explicit conduct are often exchanged for pictures of real children engaged in such conduct, adding fuel to the underground child pornography industry. *Hilton*, 167 F.3d at 73. By prohibiting dissemination and possession of computer-generated images, the CPPA helps to stamp out the market for child pornography involving real children. See *Osborne*, 495 U.S. at 110; *Ferber*, 458 U.S. at 759-760.

c. In sum, the provisions at issue here, like the provisions upheld in *Ferber* and *Osborne*, advance the government's compelling interest in the "prevention of sexual exploitation and abuse of children." *Ferber*, 458 U.S. at 757. The court of appeals erred in concluding otherwise.[3]

2. The court of appeals' vagueness ruling is equally flawed. The court concluded that the phrases "appears

[3] The prohibition against the promotion of visual depictions so as to convey the impression that the material is child pornography, 18 U.S.C. 2256(8)(D) (Supp. IV 1998), is independently justified under *Ginzburg* v. *United States*, 383 U.S. 463 (1966). There, the Court held that the First Amendment does not protect commercial entities that engage in "the sordid business of pandering" by "deliberately emphasiz[ing] the sexually provocative aspects of [their products] in order to catch the salaciously disposed." *Id.* at 472.

to be" and "convey[s] the impression" are "highly subjective" and that a person of ordinary intelligence "could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution." App., *infra*, 24a. Those criticisms are seriously misguided.

As the First Circuit held in *Hilton*, the statutory standard is an "objective one." 167 F.3d at 75. The relevant inquiry is whether "a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity." *Ibid.* That standard can readily be administered, particularly as applied to images of participants who possess the physical characteristics of prepubescent children. The Act's scienter requirement—that any violation must be "knowing"—further diminishes any vagueness concerns. See 18 U.S.C. 2252A(a)(1)-(5) (Supp. IV 1998). A person who honestly believes that a reasonable unsuspecting viewer would not consider the depiction to be of a minor must be acquitted. See *Hilton*, 167 F.3d at 75-76.

There may still be cases at the margin in which there is some uncertainty concerning whether the statutory standard has been satisfied. But that is not at all unusual in a statute that seeks to combat the dissemination of unlawful pornography, and it does not render the statute unconstitutional. See *Ferber*, 458 U.S. at 751 (approving definition of child pornography that includes "simulated" conduct); *Miller* v. *California*, 413 U.S. 15, 24 (1973) (approving definition of obscenity that depends on whether material "appeals to the prurient interest" of the "average person" and is "patently offensive").

3. The court of appeals also fundamentally erred in holding that the CPPA is unconstitutionally overbroad. That holding rests entirely on the court's earlier conclusions that the government's sole compelling interest is in preventing harm to children involved in the production of child pornography, and that the provisions at issue here do not advance that interest. App., *infra*, 25a-27a. As we have explained, however, that part of the court's analysis is simply incorrect. The government's compelling interest extends to all children who may become the victims of abuse. And even if the government could only seek to prevent harm to children involved in the production of child pornography, the provisions at issue here directly advance that interest.

Nor is there any other basis for a finding that the CPPA is unconstitutionally overbroad. As the First Circuit has explained, because the Act targets only those images that are "indistinguishable" from photographic images of actual children, the Act does not reach "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses." *Hilton*, 167 F.3d at 72. The Act also shields through an affirmative defense the dissemination of photographic images of youthful-looking adults in sexual poses, so long as they are not marketed as child pornography. 18 U.S.C. 2252A(c) (Supp. IV 1998). And, finally, there is no occasion in this case to consider whether the CPPA raises First Amendment concerns as applied to a narrow subset of materials that have serious literary, artistic, political, or scientific value and that are marketed as such. *Hilton*, 167 F.3d at 74. Any such First Amendment concerns would not justify facial invalidation of the CPPA. "Whatever overbreadth may exist at the edges" can be "cured through a more

precise case-by-case evaluation of the facts in a given case." *Ibid.*; see *Ferber*, 458 U.S. at 774; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-16536

THE FREE SPEECH COALITION, ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS; BOLD TYPE, INC.; JIM GINGERICH; RON RAFFAELLI, PLAINTIFFS-APPELLANTS

v.

JANET RENO, ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE, DEFENDANTS-APPELLEES

Appeal from the United States
District Court for the
Northern District of California

Filed: Dec. 17, 1999

Before: Warren J. Ferguson and Sidney R. Thomas, Circuit Judges, and Donald W. Molloy,[4] District Judge.

Opinion by Judge MOLLOY; Dissent by Judge FERGUSON.

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[4] The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

MOLLOY, District Judge:

I.

The question presented in this case is whether Congress may constitutionally proscribe as child pornography computer images that do not involve the use of real children in their production or dissemination. We hold that the First Amendment prohibits Congress from enacting a statute that makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct.

II.

In this case, the district court found that the Child Pornography Prevention Act of 1996 ("CPPA" or the "Act") was content-neutral, was not unconstitutionally vague or overbroad, and did not constitute an improper prior restraint of speech. The district court also found that the Child Pornography Prevention Act's affirmative defense did not impermissibly shift the burden of proof to a defendant by virtue of an unconstitutional presumption.

While we agree that the plaintiffs have standing to bring this case and that the Act is not an improper prior restraint of speech, the balance of the district court's analysis does not comport with what we believe is required by the Constitution. We find that the phrases "appears to be" a minor, and "convey[s] the impression" that the depiction portrays a minor, are vague and overbroad and thus do not meet the requirements of the First Amendment. Consequently we hold that while these two provisions of the Act do not pass constitutional muster, the balance of the Child Pornography

Prevention Act is constitutional when the two phrases are stricken. Whether the statutory affirmative defense is constitutional is a question that we leave for resolution in a different case.

A.

The appellants consist of a group that refers to itself as "The Free Speech Coalition." The Free Speech Coalition is a trade association of businesses involved in the production and distribution of "adult-oriented materials." Bold Type, Inc. is a publisher of a book "dedicated to the education and expression of the ideals and philosophy associated with nudism;" Jim Gingerich is a New York artist whose paintings include large-scale nudes; and Ron Raffaelli is a professional photographer whose works include nude and erotic photographs.

The Free Speech Coalition sought declaratory and injunctive relief by a pre-enforcement challenge to certain provisions of the Child Pornography Prevention Act of 1996. The complaint was filed in the Northern District of California. Both parties moved for summary judgment. The district court determined the CPPA was constitutional and granted the government's motion for summary judgment. *See The Free Speech Coalition v. Reno*, No. C 97-0281 VSC, 1997 WL 487758, at *7 (N.D. Cal. Aug. 12, 1997).[5] At the same time it denied Free Speech's cross motion for summary judgment. *See id.* After the district court's adverse ruling, Free Speech appealed.

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[5] The Opinion of the district court is not published in the Federal Supplement.

In this appeal, Free Speech argues the district court was mistaken in its determination that the legislation is content neutral. They also argue that the district court was wrong to hold that the Act is not unconstitutionally vague. The argument is that where the statute fails to define "appears to be" and "conveys the impression," it is so vague a person of ordinary intelligence cannot understand what is prohibited. Free Speech also questions the district court's holding that the affirmative defense provided in the Act is constitutional. Finally, Free Speech appeals the lower court's determination that the Act does not impose a prior restraint on protected speech and that it does not create a permanent chill on protected expression.

B.

Child pornography is a social concern that has evaded repeated attempts to stamp it out. State legislatures and Congress have vigorously tried to investigate and enact laws to provide a basis to prosecute those persons involved in the creation, distribution, and possession of sexually explicit materials made by or through the exploitation of children. Our concern is with the most recent federal law enacted as part of the effort to rid society of the exploitation of children for sexual gratification, the Child Pornography Prevention Act of 1996.

1.

The original federal legislation specifically prohibiting the sexual exploitation of children has been amended several times since it was enacted as the Protection of Children Against Sexual Exploitation Act of 1977. *See* Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251-2253). The

conduct prohibited by this law criminalized using a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct with the knowledge that it was or would be transported in interstate or foreign commerce. *See id.* Visual depiction was defined as including undeveloped film. *See United States v. Smith*, 795 F.2d 841, 846-47 (9th Cir. 1986). The term also included reproductions of photographs or pictures. *See United States v. Porter*, 709 F. Supp. 770, 774 (E.D. Mich. 1989), *aff'd*, 895 F.2d 1415 (6th Cir. 1990) (unpublished mem.). The language of 18 U.S.C. §§ 2251 and 2252 has survived overbreadth and vagueness challenges. *See, e.g., United States v. Reedy*, 845 F.2d 239, 241 (10th Cir. 1988).

The Protection of Children Against Sexual Exploitation Act was enacted based upon congressional findings that child pornography and prostitution were highly organized, highly profitable, and exploited countless numbers of real children in its production. *See New York v. Ferber*, 458 U.S. 747, 749 n. 1, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982) (citing S. Rep. No. 95-438, at 5 (1977)). While the Act criminalized the commercial production and distribution of visual depictions of real children under the age of sixteen engaging in sexually explicit conduct, it also extended the prohibitions of the Mann Act, 18 U.S.C. §§ 2421-2424, so as to criminalize the interstate transportation of children or juveniles for the purpose of prostitution. *See* Pub. L. No. 95- 225, § 3, 92 Stat. 7 (1977). The Act criminalized a broad range of sexual acts.

2.

The Protection of Children Against Sexual Exploitation Act had its problems. According to the Final

Report of the Attorney General's Commission on Pornography, only one person was convicted under the Act's production prohibition. *See* Attorney General's Comm'n On Pornography, *Final Report* 604 (1986) (hereinafter "AG Report"). As a consequence of the law's deficiencies and the Supreme Court's ruling in *Ferber*, Congress enacted the Child Protection Act of 1984. *See* Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2253). The Child Protection Act did away with the earlier requirement that the prohibited material be considered obscene under *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973), before its production, dissemination, or receipt was criminal. *See id.* § 4. The Child Protection Act also raised the age limit for protecting children involved in the production of sexually explicit material from sixteen years to eighteen years. *See id.* § 5.

When the Child Protection Act of 1984 was enacted Congress recognized that a great deal of pornographic trafficking involving children was not for profit. Thus, the 1984 law also did away with the requirement that the production or distribution of the material be for the purpose of sale. *See id.* §§ 4, 5. The 1984 law also picked up on a key phrase from *Ferber*, where the Supreme Court discussed limits on the classification of child pornography, stating that the "nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct. . . ." *Ferber*, 458 U.S. at 764, 102 S. Ct. 3348. Congress changed the phrase "visual or print medium" in the former law to the phrase "visual depiction." *See* Pub. L. No. 98-292, §§ 3, 4, 98 Stat. 204 (1984). Finally, Congress substituted the word "lascivious" for the word

"lewd" in the definition of "sexual conduct" to make it clear that the depiction of children engaged in sexual activity was unlawful even if it did not meet the adult obscenity standard. *See id.* § 5.

3.

In 1986, Congress amended the law once again. The Child Sexual Abuse and Pornography Act of 1986, Public Law No. 99-628, § 2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251), banned the production and use of advertisements for child pornography. Another statutory change made wrongdoers subject to liability for personal injuries to children resulting from the production of child pornography. *See* Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783 (1986) (codified as amended at 18 U.S.C. § 2255). By passing these Acts, Congress continued its quest to end "kiddie porn."

4.

The continuing effort to marshal a means of stopping child pornography resulted in the passage of the Child Protection and Obscenity Enforcement Act of 1988. *See* Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. §§ 2251A-2252). This law made it unlawful to use a computer to transport, distribute, or receive child pornography. *See id.* § 7511. It also added a new section to the criminal law that prohibited the buying, selling, or otherwise obtaining of temporary custody or control of children for the purpose of producing child pornography. *See id.* § 7512. The new law required record keeping and imposed disclosure requirements on the producers of certain sexually explicit matter. *See id.* § 7513.

5.

In 1990 the Supreme Court decided *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L.Ed.2d 98 (1990). *Osborne* upheld an Ohio law that prohibited possessing and viewing child pornography. *See* 495 U.S. at 111, 110 S. Ct. 1691. Soon thereafter, the Child Protection Restoration and Penalties Enhancement Act of 1990 was passed. *See* Pub. L. No. 101-647, § 301, 104 Stat. 4789 (1990) (codified as amended at 18 U.S.C. § 2252(a)(4)). This law criminalized the possession of three or more pieces of child pornography. *See id.* § 323. Again in 1994, the federal law concerning child pornography was amended to punish the production or importation of sexually explicit depictions of a minor. *See* Pub. L. No. 103-322, § 16001, 108 Stat. 2036 (1994) (codified as amended at 18 U.S.C. § 2259). But, as with all the predecessor protective laws, this statute protected real children from exploitation. *See id.* The law also mandated restitution for victims of child pornography. *See id.* § 40113.

Throughout the legislative history, Congress has defined the problem of child pornography in terms of real children. Up until 1996 the actual participation and abuse of children in the production or dissemination or pornography involving minors was the *sine qua non* of the regulating scheme. The legislation tracked the decisions of the Supreme Court as well as the swift development of technology and its nearly infinite possibilities. The statutory odyssey was from adult pornography secured or not by the First Amendment, to child pornography permitted or not, to pseudo child pornography protected or not, until in 1996 the law was amended to prohibit virtual child pornography. The

1996 law, the law at issue here, changed course. The regulation direction shifted from defining child pornography in terms of the harm inflicted upon real children to a determination that child pornography was evil in and of itself, whether it involved real children or not. This shift forms the basis of the constitutional challenge Free Speech makes here.

6.

The Child Pornography Prevention Act of 1996 expanded the law to combat the use of computer technology to produce pornography containing images that look like children. The new law sought to stifle the use of technology for evil purposes. This of course was a marked change in the criminal regulatory scheme. Congress had always acted to prevent harm to real children. In the new law, Congress shifted the paradigm from the illegality of child pornography that involved the use of real children in its creation to forbid a "visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct." *See* 18 U.S.C.A. § 2256(8)(B) (West Supp. 1999).

The premise behind the Child Pornography Prevention Act is the asserted impact of such images on the children who may view them. The law is also based on the notion that child pornography, real as well as virtual, increases the activities of child molesters and pedophiles.

7.

18 U.S.C. § 2256(8)[6] defines child pornography as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct[.]"[7] At issue in this appeal are the definitions

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[6] 18 U.S.C. § 2256(8) defines child pornography as:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where-
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. . . .

[7] "Sexually explicit conduct" means:

> actual or simulated-
>
> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (B) bestiality;
>
> (C) masturbation;
>
> (D) sadistic or masochistic abuse; or

> (E) lascivious exhibition of the genitals or pubic area of any person.

18 U.S.C.A. § 2256(2) (West Supp. 1999).

contained in subsections (B) and (D) of § 2256(8). Section 2256(8)(B) bans sexually explicit depictions that appear to be minors. Section 2256(8)(D) bans visual depictions that are "advertised, promoted, presented, described or distributed in such a manner that conveys the impression" that they contain sexually explicit depictions of minors.

Because we hold the language at issue is unconstitutional, we do not consider the challenge to the affirmative defense in 18 U.S.C. § 2252A(c).[8]

III.

Standing is a question of law reviewed de novo. *See Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997). A party has standing to bring a claim before a court if the party has suffered "'actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *See The Free Speech Coalition*, 1997 WL 487758, at *2 (citing *Valley Forge Christian College v.*

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[8] The CPPA, 18 U.S.C. § 2252A(c), provides an affirmative defense for violations of the Act if:

> (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
>
> (2) each such person was an adult at the time the material was produced; and
>
> (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982)).

The record shows the individuals and businesses within The Free Speech Coalition withheld or stopped distributing products out of fear that they would be prosecuted for such behavior. The district court was correct in finding the facts presented here are sufficient to confer standing. The government does not question the district court's standing decision.

IV.

A.

A challenge to the constitutionality of a federal statute is reviewed de novo. *See Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996). A district court's decision to grant summary judgment is reviewed de novo. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). When the district court upholds a restriction on speech, we conduct an independent de novo examination of the facts. *See Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1209 n. 2 (9th Cir. 1996).

1.

The district court held that the contested provisions of the Child Pornography Prevention Act are content-neutral regulations. *See The Free Speech Coalition*, 1997 WL 487758, at *7. The district judge reasoned that the law was passed to prevent the secondary effects of the child pornography industry, specifically the exploitation and degradation of children. *See id.* The court also found that the Act addressed the need to

control child pornography because virtual pornography led to the encouragement of pedophilia and the molestation of children. *See id.* This reasoning was based on a finding that the CPPA is intended "to counteract the effect that [real or virtual child pornography] has on its viewers, on children, and to society as a whole." *Id.* The lower court expressly found the legislation was not intended to regulate or outlaw the ideas themselves. *See id.*

We do not agree. In *United States v. Hilton*, 167 F.3d 61, 68-69 (1st Cir. 1999), *pet. for cert., filed*, No. 98-9647 (U.S. 1999), the First Circuit found that the Act at issue was content-based because it expressly aims to curb a particular category of expression, child pornography, by singling out the type of expression based on its content and then banning it. The *Hilton* court's determination that blanket suppression of an entire type of speech is a content-discriminating act is a legal conclusion with which we agree. The child pornography law is at its essence founded upon content-based classification of speech.

The CPPA prohibits any sexually explicit depiction that "appears to be" of a minor or that is distributed or advertised in such a manner as to "convey the impression" that the depiction portrays a minor. Thus, the CPPA distinguishes favored from disfavored speech on the basis of the content of that speech. *See Crawford*, 96 F.3d at 384.

Part of the rationale for the Act is the congressional determination that "a major part of the threat to children posed by child pornography is its effects on the viewers of such material[.]" S. Rep. No. 104-358, at 17 (1996). The Congress surmised that "the effect is the

same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by computer." *Id.* One Senator referred to the notion that "[c]omputer imaging technology has given child pornographers a new way to create 'synthetic' child pornography which is virtually indistinguishable from 'traditional' child pornography." *Id.* at 26. This belief was then carried to its logical content-based conclusion that "'synthetic' child pornography which looks real to the naked eye will have the same effect upon viewers as 'traditional' child pornography." *Id.*

The government contends the district court was right in finding that the law is content-neutral. The government argues that because Congress enacted the CPPA to address the secondary effects of speech appearing to depict children's sexual activity, this secondary-effects justification for the CPPA hinges upon the effect of pornography seemingly involving children upon its viewers.

When a statute restricts speech by its content, it is presumptively unconstitutional. *See Crawford*, 96 F.3d at 385. As the First Circuit determined in *Hilton*:

> The CPPA fails both tests for substantive neutrality: it expressly aims to curb a particular category of expression (child pornography) by singling out that type of expression based on its content and banning it. Blanket suppression of an entire type of speech is by its very nature a content-discriminating act. Furthermore, Congress has not kept secret that one of its motivating reasons for enacting the CPPA was to counter the primary effect child pornography has on those who view it.

167 F.3d at 68-69 (footnote omitted). The CPPA is not a time, place, or manner regulation.

2.

Under the circumstances, if the CPPA is to survive the constitutional inquiry the government must establish a compelling interest that is served by the statute, and it must show that the CPPA is narrowly tailored to fulfill that interest. *See Crawford*, 96 F.3d at 385-86.

The district court found that even if no children are involved in the production of such materials the devastating secondary effect that sexually explicit materials involving the images of children have on society, and on the well being of children, merits the regulation of such images. *See The Free Speech Coalition*, 1997 WL 487758, at *4. This legislative finding supported the lower court's finding of a compelling state interest. *See id.* We believe this legal determination is wrong.

There are three compelling interests put forward when instituting efforts to curb child pornography using images of actual children. The first interest is that child pornography requires the participation of actual children in sexually explicit situations to create the images. The second interest stems from the belief that dissemination of such pornographic images may encourage more sexual abuse of children because it whets the appetite of pedophiles. The third interest is that such images are morally and aesthetically repugnant.

The Supreme Court has required state statutes criminalizing child pornography to limit the offense to "works that visually depict explicit sexual conduct by

children below a specified age." *Ferber*, 458 U.S. at 764, 102 S. Ct. 3348. The *Ferber* Court specifically focused on the harm to children. *See* 458 U.S. at 758, 102 S. Ct. 3348. It also found that distribution of pornographic images is "intrinsically related" to the harm suffered by child victims because the images produced are a permanent record of the child's participation, exacerbated by its dissemination. *See id.* at 759, 102 S. Ct. 3348. The Court reasoned that the distribution network for such images needs to be terminated if it is to be effectively controlled. *See id.* The *Ferber* Court acknowledged that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." *Id.* at 763, 102 S. Ct. 3348.

The language of the statute questioned here can criminalize the use of fictional images that involve no human being, whether that fictional person is over the statutory age and looks younger, or indeed, a fictional person under the prohibited age. Images that are, or can be, entirely the product of the mind are criminalized. The CPPA's definition of child pornography extends to drawings or images that "appear" to be minors or visual depictions that "convey" the impression that a minor is engaging in sexually explicit conduct, whether an actual minor is involved or not. The constitutionality of this definition is not supported by existing case law.

The rationale articulated in *Ferber* and the constitutional permissibility of regulating the category of child pornography as a separate class is not justified by consideration of the effects such images have on others, even if those effects exist. Instead the focus of analysis is on the harm to the children actually used in the

production of the materials.[9] Nothing in *Ferber* can be said to justify the regulation of such materials other than the protection of the actual children used in the production of child pornography. The language of the statute criminalizes even those materials that do not involve a recognizable minor. This shift is a significant departure from *Ferber*. While the government is given greater leeway in regulating child pornography, materials or depictions of sexual conduct "which do not involve live performance or photographic or other visual reproduction of live performances, retain[s] First Amendment protection." *Ferber*, 458 U.S. at 765, 102 S. Ct. 3348.

Ferber considered the possibility of simulations of sexually explicit acts involving non-recognizable minors and implicitly found them to be constitutionally protected. *See id.* at 763, 102 S. Ct. 3348. The Court also implicitly rejected the regulation of pornography that does not involve minors. *See id.* Thus, the case law demonstrates that Congress has no compelling interest in regulating sexually explicit materials that do not contain visual images of actual children. Furthermore, to the extent Congress' justification for the CPPA relies upon such pornography's effect on third parties—children victimized by pedophiles who consume sexually explicit depictions that appear to involve minors—

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[9] The dissent rhetorically asks "Why should virtual child pornography be treated differently than real child pornography?" and then suggests there is no "value" in any pornography involving children, whether it involves real persons or imaginary computer images. This is the critical fault in the secondary effects analysis because it shifts the argument focus from whether the questioned speech or images are constitutionally protected to a focus on how the speech or image affects those who hear it or see it.

the Seventh Circuit has articulated a compelling reason for preventing such third party injury from superseding First Amendment rights.

In *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 334 (7th Cir. 1985), *aff'd*, 475 U.S. 1001, 106 S. Ct. 1172, 89 L.Ed.2d 291 (1986), the Seventh Circuit invalidated a city ordinance prohibiting pornography that portrayed women submissively or in a degrading manner. In *Hudnut*, an argument about the consequences of pornography was put forth to justify the Indianapolis ordinance. *See* 771 F.2d at 328. The defendants maintained that pornography influences attitudes, and that the ordinance was a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness. *See id.* at 328-29. It was argued that the ordinance would play an important role "in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it." *Id.* at 325. The Court accepted the premise that "depictions of subordination tend to perpetuate subordination" which in turn leads to "affront and lower pay at work, insult and injury at home, and battery and rape on the streets." *Id.* at 329. Even so, the *Hudnut* court reasoned that pornography's role, if any, in preserving systems of sexual oppression "simply demonstrate[d] the power of pornography as speech. . . . Pornography affects how people see the world, their fellows, and social relations." *Id.*

As the Seventh Circuit noted, however, the unhappy effects of pornography depend on mental intermediation. *See id.* This is particularly so when the images

are not of real human beings, but are representations of a loathsome mind reduced to virtual reality by the technology of graphic computer art. Further,

> Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. . . . If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

Id. at 330.

By the same token, any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions. This is so because to hold otherwise enables the criminalization of foul figments of creative technology that do not involve any human victim in their creation or in their presentation. *Cf. Jacobson v. United States*, 503 U.S. 540, 548-49, 112 S. Ct. 1535, 118 L.Ed.2d 174 (1992) (invalidating a federal child pornography conviction and holding that even the compelling interest in protecting children from sexual exploitation does not justify modifications in otherwise applicable rules of criminal procedure); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994) (interpreting 18 U.S.C. § 2252 to require the prosecution to prove the defendant knew the material was produced with the use of a minor, in part because to find otherwise would be constitutionally problematic).

The critical ingredient of our analysis is the relationship between the dissemination of fabricated images of child pornography and additional acts of sexual abuse. Factual studies that establish the link between computer-generated child pornography and the subsequent sexual abuse of children apparently do not yet exist. *See* Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 483, 488, 490 (1996). The legislative justification for the proposition was based upon the Final Report of the Attorney General's Commission on Pornography, a report that predates the existing technology. *See id.* at 490. The Final Report emphasized the victimization of real children by adult distribution of the pornographic material. The report shows that the use of sexually explicit photos or films of actual children to lure other children played a small part in the overall problem involving harm to children. *See id.* (citing AG Report at 649-50). Thus, while such images are unquestionably morally repugnant, they do not involve real children nor is there a demonstrated basis to link computer-generated images with harm to real children. Absent this nexus, the law does not withstand constitutional scrutiny.[10]

[10] The dissent's argument about the secondary effects justification for permitting the statutory regulation here is not sound because it makes too much of dicta set forth in *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L.Ed.2d 98 (1990). In the first place *Osborne* involved real children. Protecting harm to real children is the point that constitutionally limits the power of Congress to ban some forms of expression.

The premise of the secondary effects argument assumes that children will be enticed by pedophiles to illicit sexual behavior, and consequent injury, if they look at pictures of other kids engaged in sexually explicit conduct. Even if the pictures don't involve real kids, the "realism" of computer images that "appear to be" or "create the impression" of real children can be used by pedophiles to entice a vulnerable child into illegal sexual acts. Thus, according to the dissent, there is a justification to protect kids from the harmful secondary effects of images that don't involve real people. The vulnerability argument makes no constitutional sense in light of *Ferber's* acknowledgment that adults who look like minors can be used in place of minors in sexually explicit "art" or film depictions. In other words, if the dissent's argument is sound, it would work to bar expression of constitutionally protected speech under *Ferber*. Nothing would keep the determined pedophile from using *Ferber* protected images to entice the vulnerable child into harmful sexual conduct.

A similar fault lies in the dissent's reasoning regarding "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses [that] plainly lie beyond the Act," citing *Hilton*, 167 F.3d at 72. Children are enamored by cartoons and drawings. They are regularly used as a means of teaching and entertaining. Much debate exists about the effects that cartoons and video or computer games have on violent behaviors or other antisocial behaviors involving children. It is unsound to reason that cartoons cannot suggest pornographic behavior or that cartoons could not be used to entice a vulnerable child into illicit sexual behavior. *Cf.* Fritz the Cat (1972) (X-rated cartoon movie, loosely based on Underground Comics' character by Robert Crumb, depicting cat's adventures in group sex, college radicalism, and other hazards of life in the 1960's).

Many innocent things can entice children into immoral or offensive behavior, but that reality does not create a constitutional power in the Congress to regulate otherwise innocent behavior. By the dissent's reasoning a pedophile could use cartoons depicting explicit sexual conduct involving minors to entice a child into engaging in sexually explicit behavior but this would "plainly lie beyond the Act." Cartoons or other images cannot be constitu-

By criminalizing all visual depictions that "appear to be" or "convey the impression" of child pornography, even where no child is ever used or harmed in its production, Congress has outlawed the type of depictions explicitly protected by the Supreme Court's interpretation of the First Amendment. Because the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment.

Our determination is not to suggest that anyone condones the implicit or explicit harmful secondary effects of child pornography. Rather it is a determination to measure the statute by First Amendment standards articulated by the Supreme Court. To accept the secondary effects argument as the gauge against which the statute must be measured requires a remarkable shift in the First Amendment paradigm. Such a transformation, how speech impacts the listener or viewer, would turn First Amendment jurisprudence on its head.

In short, we find the articulated compelling state interest cannot justify the criminal proscription when no actual children are involved in the illicit images

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tionally distinguished from other fictional images based upon the quality of the realism.

The dissent wrongly suggests that our holding accords "virtual child pornography the full protection of the First Amendment." Because the statute is severable, our holding demonstrates that if morphed computer images are of an identifiable child, the statute is enforceable because there is then the potential for harm to a real child.

either by production or depiction. Because we find that Congress has not provided a compelling interest, we do not address the "narrow tailoring" requirement.

3.

The district court found the CPPA is not unconstitutionally vague as it gives sufficient guidance to a person of reasonable intelligence as to what it prohibits. *See The Free Speech Coalition*, 1997 WL 487758, at *6. The *Hilton* court scrutinized the statute with a "skeptical eye" because the new law impinges on freedom of expression. *See* 167 F.3d at 75. In doing so, it concluded, as the district court did here, that the CPPA was not unconstitutionally vague. *See id.* at 76-77. In making its determination the First Circuit applied an objective standard to determine the meaning of the phrase, "appears to be a minor." *See id.* at 75.

A statute is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983). The requirement involves an understanding by a putative actor about what conduct is prohibited. It is impermissible to define a criminal offense so vaguely that an ordinary person is left guessing about what is prohibited and what is not. Notice that does not provide a meaningful understanding of what conduct is prohibited is vague and unenforceable. Such is the case with the statutory language prohibiting material that "appears to be" or that "conveys the impression."

The CPPA's criminalizing of material that "appears to be a minor" and "convey[s] the impression" that the material is a minor engaged in explicit sexual activity, is void for vagueness. It does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and it fails to provide explicit standards for those who must apply it, "with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972).

The two phrases in question are highly subjective. There is no explicit standard as to what the phrases mean. The phrases provide no measure to guide an ordinarily intelligent person about prohibited conduct and any such person could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution.

In the same light, the absence of definitions for these key phrases in the CPPA allows law enforcement officials to exercise their discretion, subjectively, about what "appears to be" or what "conveys the impression" of prohibited material. Thus, the vagueness of the statute's key phrases regarding computer images permits enforcement in an arbitrary and discriminatory fashion. *Cf. City of Chicago v. Morales*, ___ U.S. ___, ___, 119 S. Ct. 1849, 1862, 144 L.Ed.2d 67 (1999) (finding anti-loitering ordinance unconstitutionally vague, in part because "the 'no apparent purpose' standard [used in defining 'loitering'] is inherently subjective" and "depends on whether some purpose is 'apparent' to the officer on the scene.").

4.

The district court held that the CPPA is not overbroad because it prohibits only those works necessary to prevent the secondary pernicious effects of child pornography from reaching minors. *See The Free Speech Coalition*, 1997 WL 487758, at *6. In addition, the First Circuit reasoned that "a few possibly impermissible applications of the Act does not warrant its condemnation[,]" and found that "[w]hatever overbreadth may exist at the edges are more appropriately cured through a more precise case-by-case evaluation of the facts in a given case." *Hilton*, 167 F.3d at 74. We do not agree.

Although overbreadth must "be 'substantial' before the statute involved will be invalidated on its face[,]" *Ferber*, 458 U.S. at 769, 102 S. Ct. 3348, such overbreadth is present here. On its face, the CPPA prohibits material that has been accorded First Amendment protection. That is, non-obscene sexual expression that does not involve actual children is protected expression under the First Amendment. *See id.* at 764-65, 102 S. Ct. 3348. This rule abides even when the subject matter is distasteful.

Congress may serve its legitimate purpose in protecting children from abuse by prohibiting pornography actually involving minors. The Senate considered the constitutional impediment discussed here but disagreed with the assertion that it could not prohibit visual depictions that "appear to be" of minors engaging in sexually explicit conduct when the depictions were produced without using actual children. *See* S. Rep. No. 104-358, at 21 (1996). The Senate reasoned that

advances in technology distinguished the *Ferber* Court's holding because in 1982 when *Ferber* was decided "the technology to produce visual depictions of child sexual activity indistinguishable from unretouched photographs of actual children engaging in 'live performances' did not exist." *Id.*

The danger with this analysis is that it suggests that the more realistic an imaginary creation is, the less protection it is entitled to under the First Amendment. This is not because of any harm caused in its creation, rather it is because of the consequences of its purported reality. Yet, the Supreme Court has restricted the regulation of pornographic material involving minors because of the harm caused by its creation, not necessarily because of the consequences of its creation. The government's interest in prohibiting computer-generated child pornographic depictions is not the same as its interest in prohibiting child pornography produced by using actual children. In the latter instance there may be direct and indirect harm to a child. In the former instance there is no harm, and there can be none, to an actual child, if no real human is used in the production of the images. What is left then is an inconsistent effort to regulate the evil consequences of abusing children to make such images, even though no children are used in its production.

As explained, the CPPA is insufficiently related to the interest in prohibiting pornography actually involving minors to justify its infringement of protected speech. *See Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637-39, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980) (village could serve its legitimate interest in preventing fraud by less intrusive measures

than direct prohibition of solicitation; concluding that village ordinance was overbroad, as it had insufficient relationship with protection of public safety or residential privacy to justify interference with protected speech). The CPPA's inclusion of constitutionally protected activity as well as legitimately prohibited activity makes it overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973) (describing Supreme Court's findings of overbreadth in cases in which statutes burden protected speech and rights of association).

5.

The district court found that because the CPPA does not require advance approval for production or distribution of adult pornography that does not use minors and does not effect a complete ban on constitutionally protected material, it does not constitute an improper prior restraint on speech. *See The Free Speech Coalition*, 1997 WL 487758, at *7. We agree.

Prior restraint describes "administrative and judicial orders forbidding certain communications" before the communication occurs. *See Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 125 L.Ed.2d 441 (1993). The CPPA only penalizes speech after it occurs. As such it is not a prior restraint of speech. *See id.* at 553-54, 113 S. Ct. 2766. The possibility of self-censorship and the contention that the CPPA has a chilling effect do not amount to a prior restraint. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60, 109 S. Ct. 916, 103 L.Ed.2d 34 (1989).

V.

We hold that the language of "appears to be a minor" set forth in 18 U.S.C. § 2256(8)(B) and the language "convey[s] the impression" set forth in 18 U.S.C. § 2256(8)(D) are unconstitutionally vague and overbroad. The statute is severable. *See* Pub. L. No. 104-208, 110 Stat. 3009, § 101 (1996). The law is enforceable, except for these amendments to 18 U.S.C. § 2256, § 4 of Senate Bill 1237, through the free standing savings provisions of § 9, codified at 18 U.S.C. § 2256(9).[11]

The judgment of the district court is AFFIRMED on the questions of standing and prior restraint. The judgment of the district court is REVERSED on the questions of the constitutionality of the statutory language "appears to be a minor" and "convey[s] the impression."

The pending motion by Stop Prisoner Rape, to file an amicus brief in this case, is denied.

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[11] The Senate specifically dealt with the notion that the inclusion of entirely computer-generated images might render the law unconstitutional. Section 9 of Senate Bill 1237, codified at 18 U.S.C. § 2256(9), was added as a safeguard at the behest of Senator Biden. *See* S. Rep. No. 104-358, at 28 (1996). Section 9 prohibits the use of "identifiable minors in visual depictions of sexually explicit conduct." 18 U.S.C.A. § 2256(9) (West Supp. 1999). Section 9 was added because of the concern that the definition of "child pornography" and its application through § 4 of the Act, the language at issue here, "may be at risk of judicial invalidation insofar as it reaches images that do not depict actual minors." S. Rep. No. 104-358, at 11 (1996).

The case is remanded to the district court with instructions to enter judgment on behalf of the plaintiffs consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

FERGUSON, Circuit Judge, Dissenting:

The majority holds that Congress cannot regulate virtual child pornography[12] because it does not require the use of actual children in its production. Majority Op. at 1095. Without the use of actual children, the majority believes that Congress is simply attempting to

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[12] Computer-generated child pornography comes in many different forms. For purposes of clarity, however, I will divide it into two categories. The first is "virtual" child pornography and the second is "computer-altered" child pornography.

The key to virtual child pornography is that it does not depict an actual or "identifiable minor." Through a technique called "morphing," a picture of a real person is transformed into a picture of a child engaging in sexually explicit activity. *See* S. Rep. No. 104-358, at 15-16. Although the computer-generated image looks real, the children depicted in the image do not actually exist. *See id.* The picture is therefore 100% "virtual."

Computer-altered child pornography, by contrast, contains the image of an actual or "identifiable minor." This type of child pornography can be created by scanning the photo of a child into the computer and then with the aid of the "cut and paste" feature, attaching the child's face onto the body of another person who is engaged in sexually explicit activity. *Id.* Although the image has been altered, the child is still "recognizable" through the child's "face, likeness, or other distinguishing characteristic." 18 U.S.C.A. § 2256(9) (West Supp. 1999). Computer-altered child pornography is banned under 18 U.S.C.A. § 2256(8)(C) (West Supp. 1999). Appellants did not challenge this provision, and therefore, it will not be discussed here.

regulate "evil idea[s]." *Id.* I disagree. Congress has provided compelling evidence that virtual child pornography causes real harm to real children. As a result, virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment. In addition, I do not believe that the statutory terms "appears to be" or "conveys the impression" are substantially overbroad or void for vagueness. Accordingly, I would find the Child Pornography Prevention Act of 1996 ("CPPA") constitutional.

I.

For more than two decades, Congress has been trying to eliminate the scourge of child pornography. *See* Majority Op. at 1087-89. Each time Congress passes a law, child pornographers find a way around the law's prohibitions. *See* S. Rep. No. 104-358, at 26 (statement of Sen. Grassley). This cycle recently repeated itself and prompted Congress to enact the CPPA.

Prior to the CPPA, federal law imposed penalties on individuals who produced, distributed, or possessed visual depictions of actual minors engaging in sexually explicit conduct. *See* 18 U.S.C.A. § 2252 (West Supp. 1999). Recent advances in computer-imaging technology, however, have made this law ineffective for two reasons. First, purveyors of child pornography can now produce visual depictions that appear to be actual children engaged in sexual conduct "without using children" at all, "thereby placing such depictions outside the scope of federal law." 141 Cong. Rec. S13542 (daily ed. Sept. 13, 1995) (remarks of Sen. Hatch). Second, even where actual children are used, computers can "alter sexually explicit photographs, films, and videos in

such a way as to make it virtually impossible for prosecutors to identify individuals, or to prove that the offending material was produced using [actual] children." *Id.*

In an effort to close these loopholes, Congress enacted the CPPA which, *inter alia*, bans visual depictions that "appear[ ] to be of a minor engaging in sexually explicit conduct" or that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C.A. §§ 2256(8)(B), (D) (West Supp. 1999). Along with the CPPA, Congress included thirteen detailed legislative findings that explained why virtual child pornography must be prohibited. *See* 18 U.S.C.A. § 2251 (West Supp.1999), Historical and Statutory Notes, Congressional Findings (hereinafter "*Congressional Findings*").[13]

Despite these detailed legislative findings, the majority rules that Congress failed to articulate a "compelling state interest" to justify criminalizing virtual child pornography. Majority Op. at 1095. The majority argues that Congress cannot constitutionally regulate virtual child pornography because it does not depict "actual children." *Id.* Once "actual children" are eliminated from the equation, the majority believes that Congress is impermissibly trying to regulate "evil idea[s]." *Id.* I disagree for the following reasons.

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[13] The congressional findings were based in large part on testimony presented to the Senate Judiciary Committee. *See Child Pornography Prevention Act of 1995: Hearing before the Senate Judiciary Committee*, 104th Cong., 2d Sess. (1996) (hereinafter "*Senate Hearing*").

First. The majority improperly suggests that preventing harm to depicted children is the only legitimate justification for banning child pornography. Although this was the Supreme Court's focus in *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982), the Court has subsequently indicated a willingness to consider additional factors. *See Osborne v. Ohio*, 495 U.S. 103, 110-11, 110 S. Ct. 1691, 109 L.Ed.2d 98 (1990). In *Osborne*, the Supreme Court addressed the issue of whether Ohio could ban the possession of child pornography. *Id.* at 108, 110 S. Ct. 1691. In finding it could, the Court relied not only on the harm caused to the children who are used in its production (i.e., *Ferber*), but also on the harm that children suffer when child pornography is used to seduce or coerce them into sexual activity. *Id.* at 111, 110 S. Ct. 1691. Thus, in *Osborne*, the Court indicated that protecting children who are not actually pictured in the pornographic image is a legitimate and compelling state interest. *See Id. See also United States v. Hilton*, 167 F.3d 61, 70 (1st Cir.) (recognizing the Supreme Court's "subtle, yet crucial, extension" of valid state interests to include protecting children not actually depicted), *cert. denied* ___ U.S. ___, 120 S. Ct. 115, 145 L.Ed.2d 98 (1999).

Second. The majority ignores the fact that the Supreme Court has already endorsed many of the justifications Congress relied on when it passed the CPPA. As discussed above, the Court in *Osborne* recognized that states have a legitimate interest in preventing pedophiles from "us[ing] child pornography to seduce other children into sexual activity." *Osborne*, 495 U.S. at 111, 110 S. Ct. 1691. Relying on this justification, Congress enacted the CPPA after finding that "child pornography is often used as part of a method of

seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." *Congressional Findings*, at 3. When child pornography is "used as a means of seducing or breaking down a child's inhibitions," the images are equally as effective regardless of whether they are real photographs or computer-generated pictures that are "virtually indistinguishable." *Congressional Findings*, at 8.[14]

The Supreme Court has also recognized that states have a legitimate interest in destroying the child pornography market. *Osborne*, 495 U.S. at 110. Similarly, in enacting the CPPA, Congress declared that the statute would encourage people to destroy all forms of child pornography, thereby reducing the market for the material. *Congressional Findings* at 12. At the hearing before the Senate Judiciary Committee, witnesses testified that persons who trade and sell images that are indistinguishable from those of actual children engaged in sexual activity "keep the market for child pornography thriving." *Senate Hearing*, at 91 (testimony of Bruce Taylor).[15] This is because pictures that *look* like children engaging in sexual activities can be

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[14] *See also Senate Hearing*, at 70 (statement of Bruce Taylor, Chief Counsel for the National Law Center for Children and Families) (stating that "real and apparent [child pornography] . . . are equally dangerous because both have . . . the same seductive effect on a child victim").

[15] *See also Senate Hearing*, at 35 (testimony of Dr. Victor Cline, Emeritus Professor in Psychology at the University of Utah); *Id.* at 20, 23, 30 (testimony of Jeffrey J. Dupilka, Deputy Chief Postal Inspector for Criminal Investigations).

exchanged for pictures that *are* of actual children engaging in such activities. By limiting the production and distribution of images that appear to be of children having sex, the CPPA helps rid the market of all child pornography.[16]

Third. Even though Congress presented some new justifications that the Supreme Court has not specifically endorsed, the majority still had an obligation to consider them, as long as they advance the general goal of protecting children. In both *Ferber* and *Osborne*, the Court stated that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Osborne*, 495 U.S. at 109, 110 S. Ct. 1691, quoting *Ferber*, 458 U.S. at 756-57, 102 S. Ct. 3348. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Ferber*, 458 U.S. at 757, 102 S. Ct. 3348. Thus, the Court will generally "sustain[ ] legislation aimed at protecting the physical and emotional well-being of children even when the laws . . . operate[ ] in sensitive areas." *Id.*

The lesson from *Ferber* and *Osborne* is that legislators should be given "greater leeway" when acting to protect the well-being of children. *See Id.* at 756, 102 S. Ct. 3348. The majority, however, ignores this principle and fails to consider any of the new justifications

[16] *See Senate Hearing*, at 122 (testimony of Professor Frederick Schauer, Frank Stanton Professor of the First Amendment, Kennedy School of Government, Harvard University) (stating that it is "undoubtedly true" that "somewhere in this chain of computer-generated production there are going to be real children . . . involved").

supporting the CPPA. For example, the majority fails to address Congress' concern that computer-imaging technology is making it increasingly difficult in criminal cases for the government "to meet its burden of proving that a pornographic image is of a real child." S. Rep. No. 104-358, at 20. At a hearing before the Senate Judiciary Committee, Deputy Assistant Attorney General Kevin Di Gregory told the committee that in one federal child pornography case, the defendant relied on advances in computer technology to argue that the government had failed to meet its "burden of proving that each item of the alleged child pornography did, in fact, depict an actual minor rather than an adult made to look like one." *Id.* at 17, citing *United States v. Kimbrough*, 69 F.3d 723, 733 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157, 116 S. Ct. 1547, 134 L.Ed.2d 650 (1996). Although jurors in that case rejected this argument, Congress recognized that as computer imaging software progressed, similar arguments might undermine "the enforcement of existing laws" by raising a "built-in reasonable doubt argument in every child exploitation/pornography prosecution." S. Rep. No. 104-358, at 16-17. Congress believed that the CPPA was necessary to close this loophole, and therefore, the majority should have factored this concern into its evaluation of the case.

Fourth. The majority ignores the fact that child pornography, real or virtual, has little or no social value. *See Ferber*, 458 U.S. at 762, 102 S. Ct. 3348 (stating that the value of child pornography is "exceedingly modest, if not de minimis"). It is well established that "[t]he protection given to speech and press was fashioned to assure unfettered interchange of ideas for bringing about the political and social changes desired by

people." *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957). "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have . . . full protection . . ." *Id.* The First Amendment, however, does not protect certain limited categories of speech that are "utterly without redeeming social importance." *Id. See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992) (stating that "[f]rom 1791 to present . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas"). These categories include obscenity, *Roth*, 354 U.S. at 483, 77 S. Ct. 1304, libel, *Beauharnais v. Illinois*, 343 U.S. 250, 266, 72 S. Ct. 725, 96 L.Ed. 919 (1952), and "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73, 62 S. Ct. 766, 86 L.Ed. 1031 (1942). Child pornography is also one of these categories of speech. *Ferber*, 458 U.S. at 763-64, 102 S. Ct. 3348.

Why should virtual child pornography be treated differently than real child pornography? Is it more valued speech? I do not think so. Both real and virtual child pornography contain visual depictions of children engaging in sexually explicit activity. The only difference is that real child pornography uses actual children in its production, whereas virtual child pornography does not. While this distinction is noteworthy, it does not somehow transform virtual child pornography into meaningful speech. Virtual child pornography, like its counterpart real child pornography, is of "slight social value" and constitutes "no essential part of the exposition of ideas." *See Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766. Therefore, the majority is wrong to accord

virtual child pornography the full protection of the First Amendment.

Fifth. The majority improperly analyzes the CPPA under a strict scrutiny approach. Majority Op. at 1091. In so doing, the majority misreads the Supreme Court's previous child pornography decisions. These decisions indicate that the proper mode of analysis is to weigh the state's interest in regulating child pornography against the material's limited social value. *See Ferber*, 458 U.S. at 756-64, 102 S. Ct. 3348; *Osborne*, 495 U.S. at 108-111, 110 S. Ct. 1691. The Supreme Court used this test in *Ferber* and found that "the balance of competing interests [was] clearly struck and that it [was] permissible to consider these materials as without the protection of the First Amendment." *Id.* at 764, 102 S. Ct. 3348. *See also Osborne*, 495 U.S. at 111, 110 S. Ct. 1691 (finding that the "gravity of the State's interests" outweighed Osborne's limited First Amendment right to possess child pornography).

Virtual child pornography should be evaluated in a similar fashion. The majority should have weighed Congress' reasons for banning virtual child pornography against the limited value of such material.[17] If the majority had, it would have realized that Congress' interests in destroying the child pornography market

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[17] Scholarly writers also support using a balancing test to determine whether virtual child pornography is "outside the protection of the First Amendment." *See e.g.* Adam J. Wasserman, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 Harv. J. on Legis. 245, 274-78 (1998).

and in preventing the seduction of minors outweigh virtual child pornography's exceedingly modest social value. Since the balance of competing interests tips in favor of the government, virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment.

II.

The analysis does not end with a finding that virtual child pornography is without First Amendment protection. Statutes can be found unconstitutional if they are worded so broadly that they "criminalize an intolerable range of constitutionally protected conduct." *Osborne*, 495 U.S. at 112, 110 S. Ct. 1691. This case focuses on the CPPA's new definition of child pornography which prohibits visual depictions that "appear[ ] to be," or are promoted or distributed "in such a manner that conveys the impression," that they are "of a minor engaging in sexually explicit conduct." 18 U.S.C.A. §§ 2256(8)(B), (D) (West Supp. 1999). The majority holds that this language is overbroad because it bans "material that has been accorded First Amendment protection." Majority Op. at 1095-96. I disagree.

As a general rule, statutes should not be invalidated as overbroad unless the overbreadth is "substantial . . . in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). The Court has cautioned that the overbreadth doctrine is "strong medicine" that should be employed "sparingly and only as a last resort." *Id.* at 613, 93 S. Ct. 2908. Accordingly, a statute should not be invalidated as overbroad

"when a limiting construction has been or could be placed on the challenged statute." *Id.*

Appellants suggest that the "appears to be" language is so broad that everyday artistic expressions like paintings, drawings, and sculptures that depict youthful looking subjects in a sexual manner will be criminalized under the CPPA. However, even a glancing look at the legislative history belies this assertion. Congress enacted the CPPA to address the problem of "computer-generated" child pornography. S. Rep. No. 104-358, at 7. In the findings filed with the CPPA, Congress repeatedly stated that the law is targeted at visual depictions that are "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." *Congressional Findings*, at 5, 8, 13. The Senate Judiciary Committee explained that the "appears to be" language was necessary to cover the "same type of photographic images *already* prohibited, but which do[ ] not require the use of an actual minor." S. Rep. No. 104-358, at 21 (emphasis in original).

From reading the legislative history, it becomes clear that the CPPA merely extends the existing prohibitions on "real" child pornography to a narrow class of computer-generated pictures easily mistaken for real photographs of real children. *See Congressional Findings*, at 13. Therefore, I agree with the United States Court of Appeals for the First Circuit which found that "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses plainly lie beyond the Act." *Hilton*, 167 F.3d at 72. "By definition, they would not be 'virtually indistinguishable' from an image of an actual minor." *Id.* "The CPPA therefore

does not pose a threat to the vast majority of every day artistic expression, even to speech involving sexual themes." *Id.*

There has also been concern that the CPPA prohibits constitutionally protected photographic images of adults in sexually explicit poses. This contention, however, is also without merit. The CPPA explicitly states that "[i]t shall be an affirmative defense" to a charge of distributing, reproducing or selling child pornography that the pornography (1) "was produced using an actual person or persons," (2) each of whom "was an adult at the time the material was produced," and (3) "the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains visual depictions of a minor engaging in sexually explicit conduct." 18 U.S.C.A. § 2252A(c) (West Supp. 1999). The CPPA thus shields from prosecution sexually explicit visual depictions so long as they are produced using actual adults and "the material has not been pandered as child pornography." S. Rep. No. 104-358, at 10, 21. Persons—like the appellants in this case—who produce and distribute works depicting the sexual conduct of actual adults, and do not market the depictions as if they contain sexual images of children, are thus explicitly protected from culpability under the CPPA.

While there may be other potentially impermissible applications of the CPPA, I doubt that they would be "substantial . . . in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93 S. Ct. 2908. Rather than invalidate part of the statute based on possible problems that may never occur, it is best to

deal with those situations on a case-by-cases basis. *See Ferber*, 458 U.S. at 781, 102 S. Ct. 3348 (Stevens, J., concurring) (noting that "[h]ypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors"). Accordingly, I would find that the CPPA is not substantially overbroad. *See Hilton*, 167 F.3d at 71-74 (finding that the CPPA is not unconstitutionally overbroad); *United States v. Acheson*, 195 F.3d 645, 650-52 (11th Cir. 1999) (same).

III.

I also disagree with the majority that the CPPA is unconstitutionally vague. It is well settled that a statute is not void for vagueness unless it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983).

Here, the key phrases of the CPPA are clearly defined. The CPPA applies to visual depictions of a minor engaging in sexually explicit conduct. A minor is defined as "any person under the age of eighteen years." 18 U.S.C.A. § 2256(1) (West Supp. 1999). In addition, "sexually explicit conduct" is defined as actual or simulated "sexual intercourse . . .; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area." 18 U.S.C.A. § 2256(2) (West Supp. 1999). Given the detailed definition of sexually explicit activity, it is unlikely that a person of ordinary intelligence would be unable to determine what activities are prohibited.

The majority nevertheless finds fault with the CPPA because it believes that the terms "appears to be" and

"conveys the impression" are highly subjective and could be enforced "in an arbitrary and discriminatory fashion." Majority Op. at 1095. Once again, I disagree. With regard to the apparent age of the depicted individuals, the government can use the same type of objective evidence that it relied on before the CPPA went into effect. For example, in cases involving prepubescent individuals, the government can show the jury the pictures and the jury can determine for itself whether the virtual image "appears to be" of a minor. *See e.g. United States v. Arvin*, 900 F.2d 1385, 1390 n. 4 (9th Cir. 1990) (citing a jury instruction that requires the members of the jury to decide whether the prepubescent girls are "minors" based upon their own "observation of the pictures"), *cert. denied* 498 U.S. 1024, 111 S. Ct. 672, 112 L.Ed.2d 664 (1991). In cases in which the depicted children have reached puberty, the government can call expert witnesses to testify as to the physical development of the depicted person, and present testimony regarding the way the creator, distributor, or possessor labeled the disks, files, or videos. *See e.g. United States v. Robinson*, 137 F.3d 652, 653 (1st Cir. 1998) (noting that the pornographic photographs listed the ages of boys depicted). Based on these examples, I agree with the First Circuit which found that the standard for evaluating the key provisions of the CPPA "is an objective one." *Hilton*, 167 F.3d at 75. "A jury must decide, based on the totality of the circumstances, whether an unsuspecting viewer would consider the depiction to be an actual individual under the age of eighteen engaging in sexual activity." *Id.*

As an additional safeguard against arbitrary prosecutions, the government must satisfy the element of

scienter before it can obtain a valid conviction under the CPPA. *See* 18 U.S.C.A. § 2252A (West Supp. 1999). In any CPPA prosecution, the government must prove beyond a reasonable doubt that the individual "knowingly" produced, distributed, or possessed sexually explicit material and that the material depicts a person who appeared to the pornographer to be under the age of eighteen. *See Id. See also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994) (holding that the scienter requirement "extends to both the sexually explicit nature of the material and to the age of the performers"). "Thus, a defendant who honestly believes that the individual depicted in the image appears to be 18 years old or older (and is believed by a jury), or who can show that he knew the image was created by having a youthful-looking adult pose for it, must be acquitted, so long as the image was not presented or marketed as if it contained a real minor." *Hilton*, 167 F.3d at 75-76. Based on these safeguards, the majority's concerns about arbitrary and discriminatory prosecutions are misplaced. *See Id.* at 74-77 (finding that the CPPA is not unconstitutionally vague); *Acheson*, 195 F.3d at 652-53 (same).

IV.

In sum, the CPPA is not, as the majority claims, an attempt to regulate "evil idea[s]." Instead, the CPPA is an important tool in the fight against child sexual abuse. The CPPA's definition of child pornography provides adequate notice of the type of images that are prohibited and does not substantially encroach on protected expression. Accordingly, I would find the CPPA constitutional.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-16536
D.C. No. CV 97-0000281-SC

THE FREE SPEECH COALITION, ET AL.,
PLAINTIFFS-APPELLANTS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
DEFENDANTS-APPELLEES

[Filed: July 19, 2000]

ORDER

Before: FERGUSON and THOMAS, Circuit Judges, and MOLLOY,[18] District Judge.

The panel as constituted above, has voted as follows: Judges Thomas and Molloy voted to deny the petition for rehearing. Judge Thomas voted to reject the suggestion for rehearing en banc and Judge Molloy recommends rejection of the suggestion; Judge Ferguson voted to grant the petition for rehearing and recommended granting the suggestion for rehearing en banc.

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[18] The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

A judge of the court called for a vote on the suggestion for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

WARDLAW, Circuit Judge, with whom O'SCANNLAIN and T.G. NELSON, Circuit Judges, join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying the petition for rehearing en banc. The divided panel decision warranted this Court's en banc attention because it creates a conflict with our sister circuits on an issue of exceptional importance.

The conflict? The panel majority struck down the provisions of the Child Pornography Prevention Act of 1996 ("CPPA") that criminalize visual depictions that "appear to be" or "convey the impression" of child pornography. *See Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999). It held that these provisions violate the First Amendment because they prohibit visual images of "virtual" child pornography along with "actual" child pornography. It did so in the face of decisions of the First and Eleventh Circuits upholding the same provisions of the CPPA. *See United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999) (rejecting First Amendment challenge to CPPA on grounds of vagueness, overbreadth, and facial invalidity); *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999) (same); *see also United States v. Pearl*, 89 F. Supp. 2d 1237 (D. Utah 2000) (holding CPPA survives strict scrutiny review and expressly rejecting the panel's analysis).

The panel majority did not directly flout Supreme Court authority (the Court has yet to address "virtual" as opposed to "actual" child pornographic images). It did, however, disregard the Court's analysis of the compelling governmental interest in "safeguarding the physical and psychological well-being of a minor," which, it reasoned, includes the prevention of sexual exploitation and abuse of children. *New York v. Ferber*, 458 U.S. 747, 756-63 (1982) (holding that "actual" child pornography is a "category of material outside the protection of the First Amendment"). The panel majority narrowed this interest to include only the prevention of harm to real children stemming from their use in the production of pornographic images. At least two more compelling governmental interests are at stake, however, both of which have been identified by Congress as justifications for the regulation at issue.

First, as the Supreme Court has explained, the "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (citing 1 Attorney General's Comm'n on Pornography, Final Report 649 (1986); D. Campagna & D. Poffenberger, Sexual Trafficking in Children 118 (1988); and S. O'Brien, Child Pornography 89 (1983)). In *Osborne*, the Court reasoned that the "gravity of the State's interests in this context," including the use of child pornography in the seduction of children, justified a ban on possession of child pornography. *Id.* Thus, the harm to "real" children is real, whether or not the pornographic images which look real (or else they would not effectively serve their purpose) are actually computer-generated.

Second, Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, an interest achieved through a ban on visual depictions which "appear[ ] to be . . . of a minor engaging in sexually explicit conduct," 18 U.S.C. § 2256(8):

> As the technology of computer-imaging progresses, it will become increasingly difficult, if not impossible, to distinguish computer-generated from photographic depictions of child sexual activity. It will therefore become almost impossible for the Government to meet its burden of proving that a pornographic image is of a real child. Statutes prohibiting the possession of child pornography produced using actual children would be rendered unenforceable and pedophiles who possess pornographic depictions of actual children will go free from punishment.

S. Rep. No. 104-358, pt. IV(B); *see also Hilton*, 167 F.3d at 73 ("As technology improves and access to technology increases, efforts to eradicate the child pornography industry could be effectively frustrated if Congress were prevented from targeting sexually explicit material that 'appears to be' of real children."). Defendants have asserted that reasonable doubt exists where the government fails to prove that the images at issue were of an actual minor rather than of an adult altered to resemble one. *See* S. Rep. No. 104-358, pt. IV(B) (citing as an example *United States v. Kimbrough*, 69 F.3d 723, 733 (5th Cir. 1995)).[1] In an analogous

[1] The government was able to overcome this defense in *Kimbrough* only because it located and produced the original magazine images, which pre-dated the computer technology, from which the

situation, the Supreme Court held that the First Amendment did not bar the State of New York from prohibiting the distribution of pornographic images of children produced outside the state, noting that "[i]t is often impossible to determine where such material is produced." *Ferber*, 458 U.S. at 766 n. 19. Just as the inability to distinguish domestic from foreign materials justifies a ban on both, the impossibility of determining whether an image is "actual" or "virtual" warrants a prohibition of both.

Whether or not an individual judge agrees with the majority decision, our Court should have convened an en banc panel to consider this case because of its exceptional importance. A two-judge majority struck down provisions of a federal statute as unconstitutional when the only other federal courts to rule on the issue have rejected the same constitutional challenges. The panel majority simply dismissed the congressional findings which were based on substantial evidence of the danger to real children of the rapidly advancing computer technology. *See* S. Rep. No. 104-358, pt. IV(B); *see also Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 195 (1997) (requiring courts to "accord substantial deference to the predictive judgments of Congress" in First Amendment cases).

The distinction between "actual" child pornography—unprotected speech—and "virtual" child pornography—speech so highly regarded by the panel majority that it applied the highest level of judicial

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computer-generated images were scanned. *See* S. Rep. No. 104-358, pt. IV(B).

review—should have been more closely scrutinized by our Court. As Judge Ferguson said in dissent:

> Both real and virtual child pornography contain visual depictions of children engaging in sexually explicit activity. The only difference is that real child pornography uses actual children in its production, whereas virtual child pornography does not. While this distinction is noteworthy, it does not somehow transform virtual child pornography into meaningful speech. Virtual child pornography, like its counterpart real child pornography, is of "slight social value" and constitutes "no essential part of the exposition of ideas."

Free Speech Coalition, 198 F.3d at 1100 (Ferguson, J., dissenting) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

This issue is of immense importance not only because our Court strikes down a congressional enactment, but also because of the ready dissemination of such images via the Internet, and the lack of equally sophisticated tools for preventing their reach to those most vulnerable to their impact. The panel majority elevates the free speech rights of pedophiles over the compelling governmental interest in protecting our children. It does so in the context of technology evolving so quickly that even the applicable legal standards are in flux. There cannot be many other issues that are more "en-banc worthy" than this.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 97-0281 SC

THE FREE SPEECH COALITION, ET AL., PLAINTIFFS

v.

JANET RENO, ET AL., DEFENDANTS

[Filed: Aug. 12, 1997]

ORDER RE MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs in this action consist of a trade association that defends First Amendment rights against censorship, the publisher of a book "dedicated to the education and expression of the ideals and philosophy associated with nudism," and individual artists whose works include nude and erotic photographs and paintings. Plaintiffs have filed a pre-enforcement challenge to the constitutionality of certain provisions of the Child Pornography Prevention Act of 1996 ("CPPA"), alleging that they are vague, overbroad, and constitute impermissible content-specific regulations and prior restraints on free speech. Both plaintiffs and defendants have moved for summary judgment.

II. BACKGROUND

Congress has passed several laws[19] in an ongoing attempt to combat child pornography, the market that such pornography has created and maintained, and the harms that such pornography wreaks on children's physical, psychological, emotional, and mental health. S. Rep. No. 104-358, at 8 (1996) ("Sen. Rep."). The most recent of these laws was passed in 1996, and was enacted specifically to combat the use of computer technology to produce pornography that conveys the impression that children were used in the photographs or images. In passing the legislation, Congress recognized that the dangers of child pornography are not limited to its effect on the children actually used in the pornography. Additionally, child pornography "stimulates the sexual appetites and encourages the activities of child molesters and pedophiles, who use it to feed their sexual fantasies." Sen. Rep. at 12. Child pornography is also used by child molesters and pedophiles "as a device to break down the resistance and inhibitions of their victims or targets of molestation, especially when these are children." *Id.* at 13. "A child who may be reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photos, can sometimes be persuaded to do so by viewing depictions of other children participating in such activity." *Id.*

Congress recognized that computer technology is capable of "alter[ing] perfectly innocent pictures of children . . . to create visual depictions of those children engaging in any imaginable form of sexual

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[19] *See Am. Library Ass'n. v. Barr*, 956 F.2d 1178, 1181-85 (D.C. Cir. 1992) for a discussion of the history of national anti-child pornography legislation.

conduct." *Id.* at 15. These computer-generated pictures are often indistinguishable from photographic images of actual children. "Computer generated images which *appear to* depict minors engaging in sexually explicit conduct are just as dangerous to the well-being of . . . children as material using actual children." *Id.* at 19. Thus, Congress passed the 1996 Act in order to prevent the effects that such computer-generated images might have, even if no children were actually used in the creation of the images.

Specifically, the CPPA defines child pornography as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that such an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. . . .

18 U.S.C. § 2256(8).

The CPPA goes on to define "sexually explicit conduct" as actual or simulated:

> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (B) bestiality;
>
> (C) masturbation;
>
> (D) sadistic or masochistic abuse; or
>
> (E) lascivious exhibition of the genitals or pubic area of any person.

18 U.S.C. § 2256(2).

The CPPA also provides an affirmative defense for violations of the Act if:

> (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
>
> (2) each such person was an adult at the time the material was produced; and
>
> (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2252A(c).

Plaintiffs contend that the CPPA "sweeps within its purview materials that involve no actual children and that traditionally and logically have never been considered to be child pornography." *Pls.' Mem. in Supp. of Mot. for Summ. Judg.* at 3. They argue that the CPPA, by prohibiting images that appear to be of children, actually criminalizes the production and sale of legitimate works that include images that look like children, but that in reality were made using adults, not children. They allege that the CPPA's "use of overbroad and vague language criminalizes forms of expression in violation of the First and Fifth Amendments." *Pls.' Mem. in Supp. of Mot. for Summ. Judg.* at 4.

III. LEGAL ANALYSIS

A. Standing

Defendants first argue that plaintiffs do not have standing to bring a claim in this Court, as they have not suffered "actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Defendants contend that plaintiffs' activities fall squarely within the affirmative defense set out in 18 U.S.C. § 2252A(c), as plaintiffs have admitted that their works involve the depiction only of non-minors[20] and that they do not market their works as child pornography.[21]

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[20] *Pls.' Opp. to Defs.' Mot. for Summ. Judg.* at 1.

[21] Defendants also contend that plaintiffs lack standing because, in their complaint, plaintiffs allege that they do not produce the type of "hard-core" sexual images that would be subject to regulation by the CPPA. As a result, defendants argue, plaintiffs cannot demonstrate a real and immediate threat of injury and therefore cannot bring this claim. *See Barr*, 956 F.2d at 1187. The Court rejects this argument. The parameters of pornography are difficult to define, and dismissing plaintiffs' claims for lack of standing is not appropriate in this case, given the variety of the plaintiffs' products.

Plaintiffs counter that they have indeed been injured by the CPPA, as plaintiffs have, in some cases, discontinued the production, distribution, and possession of the certain materials for fear of prosecution under the CPPA. The CPPA, therefore, has had a chilling effect on their speech which is sufficient to constitute standing. *See, e.g., San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1129 (9th Cir. 1996) (holding that a chilling effect on speech is a sufficient basis to establish standing in overbreadth facial challenges to government actions involving free speech); *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983).

Furthermore, plaintiffs contend that they have standing to bring their suit because the affirmative defense set out in 18 U.S.C. § 2252A(c) does not protect consumers and distributors who possess the potentially illegal materials but who are not involved in the production of sexually explicit materials, and who therefore have no way of knowing whether or not the persons depicted are real and are not minors. Plaintiffs have set forth affidavits of businesses and individuals engaged in distributing, selling, or renting sexually explicit materials who have withheld or stopped distributing certain of plaintiffs' products that plaintiffs argue should fit within the statutory defense, out of fear that they will be prosecuted under the CPPA for

possession of the materials. Plaintiffs are no longer marketing or sending those products to its distributors. *See Virginia v. Am. Booksellers Ass'n., Inc.*, 484 U.S. 383, 393 (1988) (harm resulting from speech regulation may be one of self-censorship).

The Court finds that plaintiffs' allegations are sufficient to establish the requisite standing to bring their claims before the Court.

B. Standard of Review

In evaluating the constitutionality of legislation that infringes free speech under the First Amendment, the Supreme Court has identified the appropriate criteria by which the language of the act and the purposes underlying the passage of the act shall be judged. "[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, *reh'g denied*, 492 U.S. 937 (1989) (internal quotations omitted).

In order to determine whether a regulation is content-neutral, "the principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* A "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.; see also City of Renton v. Playtime*

Theatres, Inc., 475 U.S. 41, 47-48, *reh'g denied*, 475 U.S. 1132 (1986) (upholding ordinance prohibiting adult motion picture theaters within 1,000 feet of residential zones, churches, parks, or schools on basis that regulation was content-neutral because it was aimed at the secondary effects of such theaters on the surrounding community). If it can be shown that the regulation is justified without reference to the content of the speech, then it is deemed content-neutral. *Renton*, 475 U.S. at 48.

The contested provisions of the CPPA are content-neutral regulations. They have clearly been passed in order to prevent the secondary effects of the child pornography industry, including the exploitation and degradation of children and the encouragement of pedophilia and molestation of children. Furthermore, the Supreme Court has afforded "greater leeway" to regulations of child pornography. *New York v. Ferber*, 458 U.S. 747, 756 (1982). The Supreme Court has "sustained legislation aimed at protecting the physical and well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* at 757. Given the nature of the evils that anti-child pornography laws are intended to prevent, the CPPA can easily be deemed a content-neutral regulation. For even if no children are involved in the production of sexually explicit materials, the devastating secondary effect that such materials have on society and the well-being of children merits the regulation of such images.

Plaintiffs' contention that the CPPA is content-specific is unpersuasive. They claim that the terms of the CPPA clearly target materials that convey certain

ideas to their viewers. The Court finds that the CPPA is designed to counteract the *effect* that such materials has on its viewers, on children, and to society as a whole, and is not intended to regulate or outlaw the ideas themselves. If child pornography is targeted by the regulation, it is due to the effect of the pornography on innocent children, not to the nature of the materials themselves, *especially* if that pornography contains computer-generated images of children. *See, e.g., Am. Library Ass'n v. Reno*, 33 F.3d 78, 86 (D.C. Cir. 1994) (legislation requiring producers of sexually explicit material to document the names and ages of the persons portrayed was content-neutral, as it was intended "not to regulate the content of sexually explicit materials, but to protect children by deterring the production and distribution of child pornography"); *Chesapeake B&M, Inc., v. Hartford County*, 58 F.3d 1005, 1010 (4th Cir.), *cert denied*, 116 S. Ct. 567 (1995).

According to the Supreme Court, "[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting Sys., Inc. v. Fed. Communications Comm'n*, 117 S. Ct. 1174, 1186 (1997).

The CPPA clearly advances important and compelling government interests: the protection of children from the harms brought on by child pornography and the industry that such pornography has created. It is beyond debate that the protection of children from sexual exploitation is an important government interest; indeed, the Supreme Court has deemed the

protection of the physical and psychological well-being of minors to be a "compelling" interest. *Ferber*, 458 U.S. at 756-7; *see also* Sen. Rep. at 9 (There is a "compelling governmental interest [in prohibiting] all forms of child pornography.") Furthermore, the CPPA burdens no more speech than necessary in order to protect children from the harms of child pornography. As stated aforesaid, the CPPA specifically defines "sexually explicit conduct" as "sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2). It also defines "child pornography" as any visual depiction of sexually explicit conduct where the production involves the actual use of minors engaging in such conduct, the depiction is or appears to be of a minor engaging in such conduct, the depiction has been created, adapted, or modified to appear that a minor is engaging in such conduct, or the depiction is advertised, presented or promoted in such a way as to convey the impression that a minor is engaging in such conduct. 18 U.S.C. § 2256(8). Although there may be a degree of ambiguity in the phrase "appears to be a minor," any ambiguity regarding whether a particular person depicted in a particular work appears to be over the age of eighteen can be resolved by examining whether the work was marketed and advertised as child pornography. Given that the goal of the CPPA is to prevent the digital manipulation of images to create child pornography even when no children were actually used in the production of the material, the CPPA meets that goal by regulating the narrowest range of materials that might fall within the targeted category and including an explicit definition of

the prohibited conduct. Congress certainly intended to exclude from the CPPA's reach materials that do not involve the actual or apparent depiction of children: "[The CPPA] does not, and is not intended to, apply to a depiction produced using *adults* engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor." Sen. Rep. at 21.

The affirmative defense laid out in 18 U.S.C. § 2252A(c) limits even further the scope of the CPPA by removing from the range of criminal behavior the exact type of activity in which plaintiffs claim to engage. Plaintiffs contend that their works do not involve actual children, and that their works are not marketed or advertised as works featuring sexually explicit conduct by children. Their behavior, then, falls squarely within the category specifically set out by Congress as beyond the scope of the CPPA. The Court finds that the incidental harms laid out by the plaintiffs as support for their assertion of standing in this action do not amount to the CPPA's regulating "substantially more speech than necessary to further" the goal of preventing the dangers of child molestation and pedophilia.[22] *See Pls.' Opp. to Defs.' Mot. for Summ. Judg.* at 7-8. Although the effects of a content-neutral speech regulation may be substantial, if they are incidental and largely unavoidable, they will pass constitutional muster. *Am. Library Ass'n. v. Reno*, 33 F.3d at 87-8. Also, "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to

[22] These incidental harms include the depiction of images created within the imagination of the artist. If the images depicted are of children, albeit imaginary ones, and not of actual adults or imaginary people who unequivocally appear to be adults, then the evils associated with child pornography cannot be avoided.

render an antiobscenity law unconstitutional." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60(1989). The contested provisions of the CPPA survive the intermediate scrutiny set forth by the Supreme Court for content-neutral regulations.

The instant case is quite similar to that which the Supreme Court confronted in *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, the Court upheld a New York statute that prohibited persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance. The Court concluded that the statute did not violate the First Amendment. According to the Court, the unprotected nature of the works involved permitted the state to prohibit the particular category of works from distribution, especially given the compelling state interest in protecting children from the harms of child pornography. 458 U.S. at 765.

The final inquiry this Court must make is whether the regulations leave open alternative channels for communication of the information at issue. Defendants contend that "plaintiffs are free to communicate any substantive message they desire, through any medium they desire, as long as they are not depicting actual or computer-generated children engaged in sexually explicit conduct." *Defs.' Mem. in Supp. of Mot. for Summ. Judg.* at 20. The Court finds this argument persuasive. Because plaintiffs allege that their materials are not produced using minor children, and that they do not market their materials so as to suggest that they are child pornography or to exploit the sexual qualities of the work as child pornography, plaintiffs should have no trouble conforming their activities to fit within the

confines of the text of the CPPA or to escape the reach of the law altogether.

C. Overbreadth and Vagueness

Plaintiffs contend that the CPPA is unconstitutionally overbroad and vague. First, regulations that prohibit constitutionally protected speech as well as activity that can legitimately be prohibited are considered to be overbroad. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Plaintiffs base their overbreadth argument on the assertion that the CPPA "impermissibly suppresses material that is protected under the First Amendment" by defining child pornography as including visual depictions of adults that appear to be minors. *Pls.' Mem. in Supp. of Mot. for Summ. Judg.* at 12. In doing so, plaintiffs argue, the CPPA "bans a wide array of sexually-explicit, non-obscene material that has serious literary, artistic, political, and scientific value." *Pls.' Mem. in Supp. of Mot. for Summ. Judg.* at 13. Finally, plaintiffs cite the Supreme Court's recent ruling in *Reno v. ACLU* that the governmental interest in protecting children "does not justify an unnecessarily broad suppression of speech addressed to adults." 1997 U.S. LEXIS 4037 at *54 (striking as unconstitutional two provisions of the Communications Decency Act of 1996 that prevent the transmission of "indecent" and "patently offensive" materials over the Internet).

The Court finds that the CPPA is not overbroad. It specifies that only materials that do not use adults and that appear to be child pornography, even if they are digitally produced, are prohibited. By plaintiffs' own admission, plaintiffs' products do not fall into these categories and are also exempt under the CPPA's affirmative defense provisions. It is highly unlikely

that the types of valuable works plaintiffs fear will be outlawed under the CPPA—depictions used by the medical profession to treat adolescent disorders, adaptations of sexual works like "Romeo and Juliet," and artistically-valued drawings and sketches of young adults engaging in passionate behavior—will be treated as "criminal contraband." As long as a work does not depict children, or what appears to be children, engaged in sexually explicit conduct as defined by the statute, and the work is not marketed as child pornography or in such a way that exploits its sexual nature as child pornography, then there is no likelihood that the work will be prohibited by the CPPA. The CPPA is not overbroad because it prohibits only those works necessary to prevent the secondary pernicious effects of child pornography from reaching minors.

Plaintiffs contend that the CPPA is also unconstitutionally vague because it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). However, the CPPA does exactly what the Supreme Court has required of child pornography legislation as set out in *Ferber*: it must (1) adequately define the prohibited conduct; (2) be limited to visual depictions of children below a specific age; and (3) suitably limit and describe the category of forbidden "sexual conduct." 458 U.S. at 764. The CPPA clearly and specifically defines the prohibited conduct as the depiction of children—engaged in sexually explicit conduct. It is limited to visual depictions of minors, but simply redefines the term "depiction" to include images of children that were produced using computers or other artificial means. Finally, it suitably limits and

describes the category of forbidden conduct. As long as the person portrayed in the work is an adult, and the work is not marketed or advertised as child pornography and does not convey the impression that it is child pornography, then the CPPA's affirmative defense applies and removes the work from the scope of its provisions. The Court finds that the CPPA is not unconstitutionally vague, as it gives sufficient guidance to a person of reasonable intelligence as to what it prohibits.[23]

D. Prior Restraint

Plaintiffs contend that the CPPA imposes a prior restraint on speech by enacting a complete ban on material that contains sexually-explicit depictions of adults who appear to be minors and by chilling the expression of "artists, photographers, film makers, publishers, and merchants" by preventing them from disseminating such depictions. Plaintiffs also contend that the CPPA places unbridled discretion in the hands of government officials and deals an unnecessarily severe punishment for an incorrect determination of whether an adult appears to be a minor. The Court agrees with defendants that the CPPA neither completely bans depictions of adults who appear to be minors nor punishes producers or distributors who create works in which adults appear who might be mistaken as minors. Indeed, the affirmative defense laid out in 18 U.S.C. § 2252A(c) clearly permits the use

[23] For examples of other cases that have upheld similarly worded child pornography statutes against vagueness challenges, *see, e.g., U.S. v. Smith*, 795 F.2d 841 (9th Cir. 1986), *cert. denied*, 481 U.S. 1032 (1987); *U.S. v. Lamb*, 945 F. Supp. 441 (N.D.N.Y. 1996).

of adults, even if they look like minors, as long as the works in which they appear are not marketed as child pornography. In addition, "[n]o government official is vested with authority to permit or deny plaintiffs the right to produce these works, and thus the [CPPA] imposes no unconstitutional prior restraint on speech." *Defs.' Opp. to Pls.' Mot. for Summ. Judg.* at 17-18. The CPPA represents no more of a prior restraint on speech than the New York statute at issue in *Ferber*, and the CPPA comes within the rationale of the Supreme Court's holding in that case. Because the CPPA does not require advance approval for production or distribution of adult pornography that does not use minors, and does not effect a complete ban on constitutionally protected material, it does not constitute an improper prior restraint on speech.

IV. CONCLUSION

Therefore, this court finds that the CPPA meets constitutional standards and is therefore constitutional as written. For the foregoing reasons, plaintiffs' motion for summary judgment is hereby DENIED. Defendants' motion for judgment on the pleadings is GRANTED.

IT IS SO ORDERED.

Dated: August 12, 1997.

/s/ SAMUEL CONTI
United States District
Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 97-0281 SC

THE FREE SPEECH COALITION, ET AL., PLAINTIFFS

v.

JANET RENO, ET AL., DEFENDANTS

[Filed: Aug. 12, 1997]

JUDGMENT

In accordance with the Order granting defendants' motion for judgment on the pleadings, it is hereby ordered, adjudged, and decreed that judgment be entered in favor of defendants and against plaintiffs.

IT IS SO ORDERED.

Dated: August 12, 1997.

/s/ SAMUEL CONTI
United States District
Judge

APPENDIX E

1. Section 2251 Note of Title 18 of the United States Code states in pertinent part as follows:

CONGRESSIONAL FINDINGS

Pub. L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121, subsec. 1], Sept. 30, 1996, 110 Stat. 3009-26, provided that: "Congress finds that—

"(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;

"(2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;

"(3) child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity;

"(4) child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse

or exploitation of children, so that it can become acceptable to and even preferred by the viewer;

"(5) new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;

"(6) computers and computer imaging technology can be used to—

"(A) alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children;

"(B) produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and

"(C) alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct;

"(7) the creation of distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexu-

ally explicit conduct can haunt the minor for years to come;

"(8) the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children;

"(9) the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct;

"(10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear danger to all children; and

"(B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitatoin of actual children who are victimized as a result of the existence and use of these materials;

"(11)(A) the sexualizatoin and eroticization of minors through any form of child pornographic images has a deleteroius effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitatoin of them; and

"(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of them; and

"(12) prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children; and

"(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct."

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer,

shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs[1] (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter [18 U.S.C.A. § 2251 et seq], chapter 109A [18 U.S.C.A. § 2141 et seq.], or chapter 117 [18 U.S.C.A. § 2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter [18 U.S.C.A. § 2251 et seq], chapter 109A [18 U.S.C.A. § 2141 et seq.], or chapter 117 [18 U.S.C.A. § 2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

(c) It shall be an affirmative defense to a charge of violating paragraphs[1] (1), (2), (3), or (4) of subsection (a) that—

---

[1] So in original. Probably should be "paragraph".

[1] So in original. Probably should be "paragraph".

(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

(2) each such person was an adult at the time the material was produced; and

(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

(d) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

* * * * *

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

* * * * *

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is

or contains a visual depiction of a minor engaging in sexually explicit conduct; and

* * * * *

Supreme Court, U.S.
FILED
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No. 00-795

IN THE

Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

THE FREE SPEECH COALITION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Ninth Circuit Court of Appeals found two isolated provisions of the Child Pornography Prevention Act of 1996 to be unconstitutional on the basis that those provisions impose an unjustifiable restriction on free speech and are unduly vague and unnecessarily overbroad. The first provision bans sexually-explicit visual depictions that "appear to be" minors. The second provision prohibits sexually-explicit material that is advertised in a way that "conveys the impression" that minors are depicted. The fundamental question posed by this case is whether sexually-explicit, non-obscene material that does not depict any actual children can be labeled and banned by Congress as "child pornography."

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Summary of the Argument	1
Statement of the Case	2
A. The Child Pornography Prevention Act Of 1996	2
B. The Legislative Findings Do Not Support The CPPA's Expanded Definition Of "Child Pornography."	5
C. The CPPA Bans Respondents' Expression.	6
Reasons for Denying the Writ	9
A. The Court Of Appeals Rightly Concluded That The CPPA Constitutes An Unjustified Ban On Free Speech.	9
1. The CPPA Is A Content-Specific Ban On Protected Speech That Must Be Supported By A Compelling Governmental Interest.	10

Contents

	Page
2. The Government's Interest In Banning Child Pornography Is Limited To Sexually-Explicit Materials That Depict Actual Children.	11
3. The Other Interests Asserted By The Government Are Not Compelling And The CPPA Is Not Narrowly Tailored To Meet Them.	13
B. The Court Of Appeals Correctly Determined That The CPPA Is Unconstitutionally Vague.	15
C. The Court of Appeals Correctly Determined That The CPPA Is Unconstitutionally Overbroad.	17
D. Without The "Appears To Be" And "Conveys The Impression" Provisions, The CPPA Remains A Comprehensive And Effective Statute For Addressing Congress' Concerns About Child Pornography.	21
E. There Is No Actual Conflict Among The Federal Circuits As To The Constitutionality Of The CPPA Because The Decisions Of The First, Fourth, and Eleventh Circuits CPPA Are Not Binding Precedent.	24
Conclusion	27

TABLE OF CITED AUTHORITIES

Page

Cases:

American Library Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 2610 (1995) 16

Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983) 15

Boos v. Barry, 485 U.S. 312 (1988) 11

Butler v. Michigan, 352 U.S. 380 (1957) 15

Carey v. Population Services Int'l, 431 U.S. 678 (1977) 10

Grayned v. City of Rockford, 408 U.S. 104 (1972) 16

In re Winship, 397 U.S. 358 (1970) 20

New York v. Ferber, 458 U.S. 747 (1982) . 11, 12, 14, 18

Reno v. ACLU, 521 U.S. 844 (1997) 10, 15, 18

Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989) 11, 15

Sandstrom v. Montana, 442 U.S. 510 (1979) 20

Page

Smith v. Orr, 855 F.2d 1544 (Fed. Cir. 1988) 26

Thornhill v. Alabama, 310 U.S. 88 (1940) 17

United States v. Acheson, 195 F.3d 645 (11th Cir. 1999) 24, 25

United States v. Hilton, 167 F.3d 61 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999) 24, 25, 26

United States v. Knox, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 897 (1995) 17

United States v. Mento, No. 99-4813, 2000 WL 1648878 (4th Cir. Nov. 3, 2000) 24, 25, 26

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 10

United States Constitution:

First Amendment 1, 2, 7, 8, 9, 10, 11, 12, 17, 18

Fifth Amendment 1, 2, 7, 15

Cited Authorities

	Page
Statutes:	
18 U.S.C. § 2251	3, 5, 21, 22
18 U.S.C. § 2252	3
18 U.S.C. § 2252A	3
18 U.S.C. § 2252A(a)(1)	23, 24
18 U.S.C. § 2252A(a)(2)	23
18 U.S.C. § 2252A(a)(3)	23
18 U.S.C. § 2252A(a)(4)	24
18 U.S.C. § 2252A(a)(5)	23
18 U.S.C. § 2252A(c)	19
18 U.S.C. § 2252A(c)(1)	19
18 U.S.C. § 2252A(c)(3)	19
18 U.S.C. § 2252A(d)	19, 20
18 U.S.C. § 2256	3
18 U.S.C. § 2256(1)	3

Cited Authorities

	Page
18 U.S.C. § 2256(2)(A)-(E)	4
18 U.S.C. § 2256(8)	4, 18, 22
18 U.S.C. § 2256(8)(B)	12, 16, 20
18 U.S.C. § 2256(8)(C)	7, 23
18 U.S.C. § 2256(8)(D)	12, 16, 20
Pub. L. No. 104-208, S 8, 110 Stat. 3009 (1996)	2, 21
Other Authorities:	
Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 483 (1996)	5
133 Cong. Rec. S14,203 (daily ed. Oct. 14, 1987)	16

SUMMARY OF THE ARGUMENT

A writ of certiorari is not warranted in this case because the three primary arguments raised by Petitioners in support of their petition are without merit.

First, the court of appeals was correct in concluding that two isolated provisions within the Child Pornography Prevention Act of 1996 ("CPPA") impose an unconstitutional prohibition on free speech, are unduly vague and unnecessarily overbroad. By banning sexually-explicit materials that depict persons who "appear to be" minors or that are advertised to "convey the impression" that minors are depicted, the CPPA is a content-specific prohibition on speech that is not justified by a narrowly-tailored compelling governmental interest. This Court has made it clear that the Government's interest in regulating child pornography is limited to sexually-explicit materials in which actual children are depicted. The CPPA's "appears to be" and "conveys the impression" provisions exceed this limited interest by banning materials that do not depict any real children. In so doing, these provisions violate the First and Fifth Amendments.

Second, even with the two unconstitutional provisions stricken from the legislation, the CPPA remains a comprehensive and effective tool for fighting the real evils of child pornography. The court of appeals excised only two isolated portions of the CPPA, leaving the bulk of the legislation intact. Contrary to Petitioners' contentions, the constitutionally-corrected CPPA is more than adequate to satisfy Congress' objectives in confronting the evils of child pornography.

Third, there is no real conflict among the circuits on this issue. Unlike the material in this case, which involves no real children, the other CPPA cases from the First, Fourth, and Eleventh Circuits concerned criminal prosecutions involving sexually-explicit material containing actual children. The defendants in those cases would have been charged with child pornography offenses under the CPPA even without the unconstitutional "appears to be" and "conveys the impression" provisions. Thus, those portions of the circuit courts' decisions regarding the constitutionality of those provisions are mere dicta.

For these reasons, the court of appeals' decision in this case does not warrant review by this Court.

STATEMENT OF THE CASE

This case addresses whether the CPPA violates the First and Fifth Amendments to the United States Constitution. While the material facts underlying this case are not in dispute, there are some facts that Respondents believe are omitted or mischaracterized by Petitioners ("the Government") in their petition for certiorari. It is therefore necessary to provide a limited recitation of the background and facts of this case.

A. The Child Pornography Prevention Act Of 1996

This case confronts the constitutionality of Congress' attempt to define and punish as illegal child pornography constitutionally-protected forms of expression involving no actual children. On September 30, 1996, Congress enacted Public Law 104-208, the Child Pornography Prevention Act of 1996, which, for the first time in legislative history,

radically transformed the definition of "child pornography" by including in that definition sexually-explicit depictions that contain no actual children.[1] Prior to the CPPA, Congress classified child pornography as sexually-explicit material in which actual children are depicted.[2] Specifically, the CPPA defines child pornography as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where —
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, **or appears to be**, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an

1. The CPPA amended Title 18, Chapter 110 of the United States Code by revising sections 2251, 2252, 2256 and adding a new Section 2252A. Section 2252A, entitled "Certain activities relating to material constituting or containing child pornography," prohibits persons from, *inter alia*, mailing, transporting, receiving, distributing, reproducing, selling or possessing *child pornography*, as redefined by the CPPA, within interstate or foreign commerce. 18 U.S.C. § 2252A (Supp. IV 1998)

2. "Child" and "minor" are used synonymously in this brief. A minor is defined as "any person under the age of eighteen years." 18 U.S.C. § 2256(1) (Supp. IV 1998).

> identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that **conveys the impression** that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. . . .

18 U.S.C. § 2256(8) (emphasis added).

Thus, in addition to banning visual depictions of real children who are actually involved in sexually-explicit conduct,[3] the CPPA also prohibits visual depictions of adults who "appear to be" minors engaging in sexually-explicit conduct, depictions of identifiable children whose images have been altered by a computer or "morphed" so that they appear to be engaging in sexual activity, and material that, while not containing sexually-explicit depictions of identifiable minors, "conveys the impression" that it might have such depictions. This case considers only the "appears to be" and "conveys the impression" provisions, whereby the CPPA criminalizes material that does not contain actual children or images of identifiable children.

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3. "Sexually explicit conduct" is defined as actual or simulated: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; or (5) lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. § 2256(2)(A)-(E).

B. The Legislative Findings Do Not Support The CPPA's Expanded Definition Of "Child Pornography."

In its petition, the Government claims that the CPPA's expanded definition of child pornography was supported by thirteen legislative findings. (Pet. 3). The Government suggests that these findings show that new photographic and computer technologies permit the production of "virtual" child pornography wherein no actual children are used or depicted. The Government implies that these "virtual" materials, in turn, are being used to seduce children into sexual activity, whet the sexual appetites of pedophiles, prevent law enforcement from obtaining convictions in child pornography cases, and sustain the market for actual child pornography. (Pet. 3-5). But a closer look at the legislative findings proves the Government's implications to be untrue. (App. 67a-70a).

While the legislative findings show that child pornography involving depictions of real children has been used to seduce other children, to whet the sexual appetites of pedophiles, and to contribute to the market for child pornography, *see* 18 U.S.C. § 2251 note Findings 3, 4, 13, there are absolutely no findings showing that computer-generated pornography, wherein no actual or identifiable children are depicted, is being used for such activities. In fact, as the court of appeals in this case recognized, there are no factual studies that establish a link between computer-generated child pornography and the sexual abuse of children. (App. 20a) (citing Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornograph 6: A First Amendment Assessment of S. 1237,* 14 J. Marshall J. Computer & Info. L. 483, 488, 490 (1996)). More critically, the legislative basis for the CPPA was grounded upon the

Final Report of the Attorney General's Commission on Pornography, a report that preexisted the advances in computer technology identified by Congress. *See id.* The legislative findings therefore do not support a complete ban on computer-generated images that do not depict real children.

In addition, there are no legislative findings demonstrating that the Government has been unable to secure convictions in child pornography cases under the pre-CPPA definition of child pornography. The Government claims that "Congress was concerned that advancing technology ***could*** render unenforceable the prohibitions against the distribution and possession of child pornography." (Pet. 5) (emphasis added). The legislative findings do not contain a single reference to computer-generated, "virtual" child pornography that has escaped successful prosecution.

In the end, the CPPA's expanded definition of child pornography is not supported by its thirteen legislative findings.

C. The CPPA Bans Respondents' Expression.

The CPPA's radical alteration and expansion of the term "child pornography" has had a profound and adverse impact on countless numbers of artists, illustrators, photographers, and other creators who participate in constitutionally-protected, expressive activity that could be deemed by some as depicting minors even though, in reality, no actual children are depicted. (App. 55a). Recognizing the real threat the CPPA presented to the expressive activity of these

individuals, Respondents, The Free Speech Coalition,[4] Bold Type, Inc.,[5] Jim Gingerich,[6] and Ron Raffaelli,[7] filed a complaint challenging the CPPA in the United States District Court for the Northern District of California on January 27, 1997.

In their complaint, Respondents asserted that the "appears to be" and "conveys the impression" provisions of the CPPA violated the First and Fifth Amendments to the Constitution. Respondents asserted that these provisions: (1) prohibit the expression of free speech in violation of the First Amendment; (2) contain overbroad and vague language in violation of the Due Process Clause of the Fifth Amendment; and (3) unduly chill constitutionally-protected speech in violation of the First Amendment. Respondents did not challenge 18 U.S.C. § 2256(8)(C), which prohibits

4. The Free Speech Coalition is a California trade association that assists film makers, producers, distributors, wholesalers, retailers and Internet providers located throughout the United States in the exercise of their First Amendment rights and in defense of those rights against censorship. The Free Speech Coalition represents more than six-hundred businesses and individuals involved in the production, distribution, sale and presentation of non-obscene, adult-oriented materials. (App. 3a).

5. Bold Type, Inc. publishes *California's Nude Beaches*, a book dedicated to the education and expression of the ideals and philosophy associated with nudism. (App. 3a).

6. Jim Gingerich is a well-known artist from New York City whose paintings include landscapes and large-scale nudes. (App. 3a).

7. Ron Raffaelli is a well-known, professional photographer who specializes in erotic photography and has published four erotic books including *Rapture*, published by Media Press in 1983. (App. 3a).

computerized "morphing" of identifiable children, an activity whereby images of real children are altered by a computer so that the children are depicted in sexually-explicit conduct. Respondents believe that, because these materials contain sexual depictions of identifiable children, or at least parts thereof, it is possible that such images could harm the children depicted, and hence, the First Amendment affords such images no protection. (App. 3a).

Respondents strongly oppose child pornography,[8] but they are nonetheless threatened and injured by the CPPA because they or their members produce, distribute, and/or possess materials, including film, photographs, paintings, and computerized images that could easily, although wrongly, be deemed to contain sexually-explicit depictions of minors. (App. 55a). None of Respondents' materials contain sexually-explicit depictions of actual minors, but the persons depicted in these materials may appear to some viewers as being under the age of eighteen or the advertising of the materials may be interpreted by some as conveying the impression that the material contains sexually-explicit depictions of minors.

As a result of the CPPA's broad prohibition of any material in which there "appears to be . . . a minor engaging in sexually explicit conduct" or that is advertised, promoted, presented, described, or distributed in such a way as to "convey the impression" that a minor is engaging in sexually-explicit activity, a number of persons have ceased the production, distribution and possession of certain forms of expression, which do not involve minors, in fear of being prosecuted under the Act. (App. 55a).

8. For example, The Free Speech Coalition has assisted in the eradication of such materials by offering and providing an award of up to ten thousand dollars in cash to any person providing information leading to the arrest and conviction of persons involved in child pornography.

REASONS FOR DENYING THE WRIT

This Court should deny the Government's request for a writ of certiorari for three reasons. First, the Government's arguments supporting the constitutionality of the "appears to be a minor" and "conveys the impression" provisions of the CPPA are without merit. Second, the court of appeals' ruling striking these two isolated provisions only invalidates a small portion of the CPPA and leaves law enforcement officials with sufficient means to achieve Congress' objectives in fighting the evils of child pornography. And third, there is no real conflict among the circuits on this issue.

A. The Court Of Appeals Rightly Concluded That The CPPA Constitutes An Unjustified Ban On Free Speech.

The court of appeals was absolutely correct in holding that the CPPA's "appears to be a minor" and "conveys the impression" provisions violate the First Amendment. Sexually-explicit, non-obscene materials depicting adults who appear to be minors or whose advertising conveys the impression that minors are depicted, when in fact they are not, are protected forms of expression under the First Amendment. By criminalizing these forms of expression because they might convey disfavored ideas to some of their recipients, the CPPA serves as a content-specific prohibition of speech, which can be upheld only if supported by a compelling governmental interest. The CPPA's content-specific prohibitions are not supported by such an interest because they exceed the Government's well-defined interest in regulating child pornography, which is limited to materials that visually depict sexual conduct by actual children.

Moreover, even if the Government's interest could be extended beyond preventing real children from being used to produce pornography, the "appears to be" and "conveys the impression" provisions of the CPPA are not narrowly tailored to support such an interest.

1. The CPPA Is A Content-Specific Ban On Protected Speech That Must Be Supported By A Compelling Governmental Interest.

This Court has consistently held that non-obscene material depicting adults engaged in sexually-explicit conduct, whether in the form of printed material, film, telephone communications, computerized images, or live performances, is protected by the First Amendment. *See Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (indecent images on the Internet). The fact that non-obscene speech may be offensive to some individuals does not justify its suppression. *See Carey v. Population Serv. Int'l*, 431 U.S. 678, 701 (1977). Indeed, "the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).

The CPPA's "appears to be" and "conveys the impression" provisions criminalize sexually-explicit materials that may communicate the impression of youthful images to their viewers. As such, these provisions are content-specific regulations of speech.[9] Laws prohibiting speech on

9. In its argument before the court of appeals, the Government conceded that the CPPA's "appears to be" and "conveys the impression" provisions are content-based regulations of speech. The Government makes no arguments to the contrary in its current petition.

the basis of its content presumptively violate the First Amendment and must be subjected to the most exacting of constitutional scrutiny. *See Boos v. Barry*, 485 U.S. 312, 321 (1988). This scrutiny requires the Government to demonstrate that the ban is supported by a compelling interest, and the ban must be narrowly tailored to serve that interest. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (invalidating federal "dial-a-porn" laws passed to protect children from harmful sexual material). The Government can demonstrate no such interest in this case.

2. The Government's Interest In Banning Child Pornography Is Limited To Sexually-Explicit Materials That Depict Actual Children.

For two decades, this Court has made it clear that the Government's interest in regulating child pornography, as compelling as it may be, is "limited to works that *visually* depict sexual conduct by children below a specified age." *New York v. Ferber*, 458 U.S. 747, 764 (1982) (footnotes omitted) (emphasis *sic*). In *Ferber*, this Court upheld a New York law prohibiting the distribution of materials depicting sexual acts by children under sixteen years of age. In so doing, the Court classified child pornography as speech unprotected by the First Amendment. *See id.* This ruling was based on documented findings that minors can suffer serious harm by participating as *performers* in sexually-explicit materials. *See id.* at 758-59. Specifically, the Court noted that: (1) "the use of children ***as subjects of pornographic materials*** is harmful to the physiological, emotional, and mental health of the child," (2) the distribution of sexual activity by juveniles makes a "permanent record of ***the child's participation [in the activity],***" and (3) the distribution network must be closed "if the

production of material ***which requires the sexual exploitation of children*** to be effectively controlled." *Id.* (emphasis added).

This Court has therefore made it clear that the Government can ban child pornography only to the extent that the proscribed material portrays sexually-explicit conduct by actual children. *See id.* at 764. The Court has stressed that the Government's interest in regulating child pornography is "limited to works that visually depict sexual conduct by children below a specific age." *Id.* at 763-64. In addition, this Court has specifically authorized the use of young-looking adults in non-obscene, sexually-explicit performances so that the literary, artistic, and scientific value of sexual depictions can be preserved under the First Amendment. *See id.*

The CPPA's definition of child pornography exceeds the limitations placed on child pornography laws by this Court in *Ferber* by allowing constitutionally-protected expression, which does not depict anyone under the age of eighteen, to be punished as criminal activity. The CPPA bans sexually-explicit depictions of adults who happen to "appear to be minors." 18 U.S.C. § 2256(8)(B) (Supp. IV 1998). And it outlaws visual depictions that are advertised, promoted, presented, described, or distributed in such a manner as to "convey the impression" that they contain sexually-explicit depictions of minors, even though the images or performers are not actually children. *See id.* § 2256(8)(D). Both of these provisions turn protected speech into criminal contraband.

Simply stated, because the CPPA's "appears to be" and "conveys the impression" provisions involve materials in which no actual children are depicted, Congress lacks any

compelling interest in banning these sexually-explicit, non-obscene materials. Congress' interest in defining "child pornography" is limited to regulating materials that contain visual depictions of *actual* children engaged in sexual conduct, and not visual depictions that may appear to some viewers to be actual children.

3. The Other Interests Asserted By The Government Are Not Compelling And The CPPA Is Not Narrowly Tailored To Meet Them.

The Government suggests that its interest in enacting the CPPA is not limited to protecting children involved in sexually-explicit material. (Pet. 16). The Government contends that it also has a compelling interest in preventing the use of images of virtual children to seduce other children or to whet the sexual appetites of pedophiles. While in the abstract these proffered governmental interests may seem compelling, the CPPA's legislative findings do not establish either that virtual child pornography is being used to harm actual children or that the Government's proffered interests are in any way advanced by an absolute ban on traditionally-protected forms of expression.

First, in order to support its claim that there is a compelling governmental interest to ban virtual child pornography, the Government suggests that there is an epidemic of computer-generated child pornography depicting virtual, not actual, children, thereby allowing sexual offenders to whet their sexual appetites and to seduce children. This is simply not the case. As the court of appeals correctly noted, factual studies linking computer-generated child pornography and the sexual abuse of children do not exist, and there is therefore no "demonstrated basis to link

computer-generated images with harm to real children." (App. 20a). In fact, the evidence presented to Congress and the findings made by Congress fail to identify even one incident where a pedophile used computer-generated child pornography involving no actual children to seduce other children or to whet the pedophile's own sexual appetite. Absent such evidence, the Government is hard-pressed to suggest that there is any interest, much less a compelling one, to protect children from harm associated with computer-generated images of persons who are not actual children.

Second, even if there were evidence to show a link between computer-generated images of "virtual" children and harm suffered by real children, the CPPA would still be unconstitutional because it is not narrowly tailored to confront this type of harm. The CPPA does not merely impose "time, place, and manner" restrictions on computer-generated or other visual materials depicting persons who "appear to be minors" or that are advertised in such a way to "convey the impression" that minors are depicted. In fact, the CPPA is not even limited to computerized images. Instead, the CPPA makes criminal and totally bans all sexually-explicit materials that contain images — computerized or otherwise — that "appear to be minors" or that are advertised in such a way to suggest minors are depicted. In so doing, the CPPA expands the definition of child pornography so as to eliminate two forms of protected speech without making any attempt to limit such expression consistent with *Ferber*. *See* 458 U.S. at 763. Indeed, the CPPA could not be more broadly drafted. In attempting to restrict the materials to which pedophiles have access, the

CPPA also bans countless other materials that law-abiding citizens have a constitutional right to view.[10]

In sum, the CPPA fails the rigors of strict scrutiny analysis because it is not narrowly tailored to support a compelling governmental interest. Accordingly, the court of appeals was correct in concluding, as a matter of law, that the CPPA's "appears to be" and "conveys the impression" provisions unconstitutionally ban protected speech, and the granting of a writ of certiorari is not warranted in this case.

B. The Court Of Appeals Correctly Determined That The CPPA Is Unconstitutionally Vague.

The Government's petition also should be denied because the court of appeals correctly determined that the challenged portions of the CPPA are void for vagueness. Under the void-for-vagueness doctrine, laws violate the Due Process Clause of the Fifth Amendment when they: (1) do not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, thereby failing to provide fair warning to those who wish to act lawfully, or (2) impermissibly delegate fundamental questions of policy to law enforcement officials, thereby allowing for unbridled and discretionary enforcement

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10. The CPPA closely resembles many other unconstitutional attempts by Congress to ban constitutionally-protected material in the name of "saving the children." *See Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (striking down federal regulations on "indecent" material on the Internet); *Sable Communications*, 492 U.S. at 128 (rejecting a ban on "dial-a-porn" messages); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73 (1983) (invalidating a ban on mailing unsolicited advertisements for birth control); *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (rejecting a ban on all sales of books deemed harmful to children).

of the law. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Both infirmities exist in the instant case.

First, the CPPA fails to define basic terms and phrases necessary to give persons of ordinary intelligence a basic understanding of what is prohibited. The CPPA does not define its highly subjective, yet key, "appears to be" and "conveys the impression" provisions. *See* 18 U.S.C. § 2256(8)(B),(D). Consequently, persons are left wondering: "Appears to whom to be a minor?" "Conveys to whom the impression that a minor is depicted?" "How does a minor appear?" Without more specific terms, no one can be exactly sure what these phrases mean, particularly since age, as with beauty, is in the eye of the beholder. *See American Library Ass'n v. Reno*, 33 F.3d 78, 90 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 2610 (1995) (citations omitted) (recognizing the difficulty in distinguishing whether performers are fourteen or eighteen, seventeen or twenty-one).

Second, the failure to provide definitions of these key phrases gives law enforcement officials unbridled discretion in enforcing the CPPA. The CPPA's undefined phrases defer to law enforcement officials in determining whether an adult depicted in a sexually-explicit work "appears to be a minor" and whether a depiction is advertised, promoted, presented, described, or distributed in such a manner that "conveys the impression" that the material is or contains a visual depiction of a minor engaging in sexually-explicit conduct. Given the fact that a United States Senator has defined "safe-sex" educational materials as obscene[11] and a federal court has

11. Senator Jesse Helms (R-N.C.) asserted that written educational materials promoting "safe sex" were "obscene." 133 Cong. Rec. S14,203 (daily ed. Oct. 14, 1987) (statement of Sen. Helms).

classified some visual depictions of fully clothed persons as "sexually explicit,"[12] one can only imagine the types of material that law enforcement officials will deem criminal under the amorphous phrases "appears to be a minor" and "conveys the impression of a minor."

Plainly, even assuming that the entire concept of prohibiting sexually-explicit visual depictions of non-children and youthful adults is constitutional under the First Amendment — a conclusion that the Respondents in this case strongly contest — the CPPA is nonetheless unconstitutionally vague, and the court of appeals was correct in so holding. Thus, the granting of a writ of certiorari is not warranted as to the issue of vagueness.

C. The Court of Appeals Correctly Determined That The CPPA Is Unconstitutionally Overbroad.

The Government's petition should also be denied because the court of appeals correctly concluded that the challenged portions of the CPPA are overbroad. Legislation regulating speech is unconstitutionally overbroad when it includes within its sweep not only activity that can legitimately be prohibited, but also activity that is constitutionally protected under the First Amendment. *See Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

The CPPA's plain language, which bans both visual depictions of adults and computer-generated non-persons who "appear to be" minors and promotional materials that

12. *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 897 (1995) (finding that the phrase "lascivious exhibition of the genitals or pubic area" does not require full or partial nudity, but can also apply to clothed persons as well).

"convey the impression" that there may be depictions of minors, is unconstitutionally overbroad because it impermissibly suppresses material that is protected by the First Amendment. *See Reno v. ACLU*, 521 U.S. at 874-75. The CPPA directly contravenes this Court's well-established precedent that, if the visual depiction of sexual activity by minors "[is] necessary for literary or artistic value, a person over the statutory age who perhaps looked younger [can] be utilized." *Ferber*, 458 U.S. at 763-64. Under the guise of protecting children, Congress has impermissibly cast its legislative net far beyond the permissible target of child pornography and into the waters of protected speech.

The Government attempts to save the CPPA from an overbreadth determination by claiming that the law only addresses computer-generated virtual images and does not reach drawings, cartoons, sculptures, and paintings. (Pet. 19). This claim is not supported by the plain language of the CPPA. The CPPA clearly states that it applies to "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means." 18 U.S.C. § 2256(8). Nothing in the CPPA limits its provisions to computer-generated images of virtual children, and the Government's interpretation does not make it so.

The Government also attempts to cure the CPPA's overbreadth problems by invoking the law's affirmative defense provision.[13] (Pet. 19). This defense, however, cannot

13. The CPPA's affirmative defense requires a person charged with producing or distributing alleged child pornography to demonstrate: (1) that the material was produced using an actual (Cont'd)

remedy the CPPA's constitutional defects because it excludes from its protection countless numbers of presumptively-protected materials and impermissibly shifts the burden of proof to persons charged with violating the CPPA. As such, it is inadequate to remedy the CPPA's overbreath.

The affirmative defense fails to rein in the broad scope of the CPPA for several reasons. First, the defense offers no protection whatsoever to consumers and distributors who are not involved in the production of sexually-explicit materials and who have no way of knowing whether persons depicted in the materials are minors or even real persons. Second, because the defense requires persons charged under the CPPA to show that their work "was produced using an actual person or persons engaging in sexually explicit conduct," 18 U.S.C. § 2252A(c)(1), it offers absolutely no protection to illustrators and artists who create sexually-explicit images exclusively from their imaginations, not from identifiable persons. Third, the affirmative defense contains the same vague language found in the CPPA's definition of child pornography because it requires a defendant to show that the material was not promoted "in such a manner as to convey the impression" that it contained an illegally-depicted minor. *See* 18 U.S.C. § 2252A(c)(3). And finally, the defense affords

(Cont'd)
person, (2) who was an adult, and (3) that the person charged did not advertise or promote the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor. 18 U.S.C. § 2252A(c). The defense requires persons charged with possessing alleged child pornography to prove that: (1) there were three or fewer images, and (2) either the images were destroyed or they were reported and provided to law enforcement officers. 18 U.S.C. § 2252A(d).

little protection to artists, illustrators, and other individuals who create constitutionally-protected art that some may wrongly interpret as depicting minors in sexual conduct. Because the affirmative defense allows these individuals to create no more than two images and requires them to destroy or forfeit the property, the artisans' rights to express themselves are completely undermined. *See* 18 U.S.C. § 2252A(d).

In addition, the affirmative defense impermissibly shifts the burden of proof to the criminally accused. Contrary to due process requirements,[14] the affirmative defense, coupled with the CPPA's presumption that persons who "appear to be" minors are in fact actually minors, shifts the burden of proof to defendants in child pornography cases by requiring them to prove that actual or fictional individuals depicted are not minors. 18 U.S.C. §§ 2256(8)(B) and (D). This is constitutionally infirm.

In light of these inadequacies, the court of appeals correctly concluded that the CPPA is unconstitutionally overbroad, and the granting of a writ of certiorari is not warranted as to this issue.

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14. Constitutional due process principles "protect[] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Accordingly, the prosecution must prove every element of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by creating a presumption. *Sandstrom v. Montana*, 442 U.S. 510, 525 (1979).

D. Without The "Appears To Be" And "Conveys The Impression" Provisions, The CPPA Remains A Comprehensive And Effective Statute For Addressing Congress' Concerns About Child Pornography.

Petitioners further claim that a writ of certiorari should be granted in this case because the court of appeals invalidated "key" provisions of the CPPA. (Pet. 12). This is inaccurate. The court of appeals found only two isolated portions of the CPPA — the "appears to be" and the "conveys the impression" provisions — to be constitutionally infirm. As a result, the court's ruling excised only two limited portions of the statute, leaving the remaining portions of the CPPA in full effect.[15] Without the two unconstitutional provisions, the CPPA remains a comprehensive and effective means for addressing Congress' objectives in fighting the evils of child pornography. As such, there is no compelling need for further appellate review.

In passing the CPPA, Congress sought to advance four primary objectives. First, Congress sought to prevent child pornography from being used to seduce children into sexual activity. *See* 18 U.S.C. § 2251, note Finding 3. Second,

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15. Congress fully realized that some of the CPPA's provisions might be stricken by the courts. As a result, Congress specifically provided that, if some aspect of the definition were to be found unconstitutional, the invalidation of one element of the definition would not necessarily render inoperable the entire statutory framework. *See* CPPA, Pub. L. No. 104- 208, § 8, 110 Stat. 3009, 3009-31 (1996) ("[i]f any provision of this Act, including any provision or section of the definition of the term child pornography, . . . is held to be unconstitutional, the remainder of this Act, including any other provision or section of the definition of the term child pornography, . . . shall not be affected thereby.")

Congress wanted to preclude pedophiles and sexual offenders from using child pornography to whet their own sexual appetites. *See id.*, Finding 4. Third, Congress sought to undermine the use of computerized "morphing" technology, which allows an image of an actual child to be scanned into a computer and altered to make it appear as though the child is engaging in sexually-explicit activity. *Id.*, Findings 7 and 8. And fourth, Congress wanted to regulate the market for child pornography by preventing computerized images of children from being exchanged for other sexually-explicit images of children. *See id.*, Finding 12. Each of these objectives is still achieved by the CPPA as construed by the court of appeals.

Even after the "appears to be" and "conveys the impression" provisions are severed from the rest of the legislation, the CPPA's definition of child pornography still includes computer or computer-generated images where: (1) the production of the image involves the use of a minor engaging in sexually-explicit conduct; (2) the image is of a minor engaging in sexually-explicit conduct; or (3) the image has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually-explicit conduct. 18 U.S.C. § 2256(8). This definition is more than adequate to achieve Congress' objectives.

Congress' concerns about pedophiles using child pornography to seduce children into sexual activity are still confronted by a constitutionally-corrected CPPA and other child pornography statutes. The sexual exploitation of children is still banned because persons are prohibited from using, enticing, or coercing a minor to engage in sexual conduct for the purpose of producing a visual depiction of the activity. *See* 18 U.S.C. § 2251. Persons are still forbidden

from mailing or transporting child pornography by any means, including the computer. *See* 18 U.S.C. § 2252A(a)(1). Persons are still prohibited from distributing any child pornography. *See* 18 U.S.C. § 2252A(a)(2). And persons are still prohibited from possessing child pornography. *See id.* § 2252A(a)(2). Thus, in addition to the various state laws against corrupting minors, there remain several provisions of the CPPA that sufficiently confront individuals who attempt to use child pornography to seduce children.

Congress' concerns about the use of child pornography to whet a person's sexual appetite are also addressed by a constitutionally-corrected CPPA and other related child pornography statutes. Possession of child pornography, for any reason, is outlawed under 18 U.S.C. § 2252A(a)(5), which prohibits the knowing possession of any material containing an image of child pornography. Consequently, the possession of child pornography to whet a person's sexual appetite, or to accomplish any other objective for that matter, is still prohibited under the CPPA.

Likewise, the so-called computer "morphing" feared by Congress is also prohibited by a constitutionally-corrected CPPA. The definition of child pornography still includes any computer or computer-generated image or picture created or adapted to make it appear that an identifiable minor is engaging in sexually-explicit conduct. 18 U.S.C. § 2256(8)(C). In addition, persons are still prohibited from reproducing child pornography for distribution by any means, including the computer. *See* 18 U.S.C. § 2252A(a)(3). As a result, computer "morphing" activity is still banned.

And finally, Congress' concerns about the exchange of computer-generated child pornography for other sexual

images of children are still addressed. Persons are still prohibited from knowingly mailing, transporting, or shipping child pornography in interstate commerce. *See* 18 U.S.C. § 2252A(a)(1). Moreover, persons are still prohibited from selling child pornography, including computer-generated images of identifiable children. *See id.* § 2252A(a)(4). Thus, even without the two constitutionally-deficient provisions, the CPPA is still an effective tool for limiting the market for child pornography.

In sum, the severance of the "appears to be" and "conveys the impression" language from the body of the CPPA still enables the bill to serve its underlying purpose. Thus, the court of appeals' severance of two isolated portions of the CPPA does not warrant this Court's review.

E. There Is No Actual Conflict Among The Federal Circuits As To The Constitutionality Of The CPPA Because The Decisions Of The First, Fourth, and Eleventh Circuits Are Not Binding Precedent.

Finally, the Government contends that this Court must accept jurisdiction in this case to resolve a conflict among the federal courts of appeals on the issue of the constitutionality of the CPPA. (Pet. 14). In support of its contention, the Government cites cases from the First, Fourth, and Eleventh Circuits, *United States v. Hilton*, 167 F.3d 61 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999); *United States v. Mento*, No. 99-4813, 2000 WL 1648878 (4th Cir. Nov. 3, 2000); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999), which upheld the constitutionality of the CPPA. (Pet. 13-14). While the holdings of these cases may indicate that there is an apparent conflict among the circuits as to the

constitutionality of the CPPA, a review of the procedural and factual posture of the cases indicates that no actual conflict exists.

Unlike the declaratory judgment action at issue in this case, each of the cases cited by the Government were criminal cases initiated by the Government. *See United States v. Mento*, 2000 WL 1648878; *United States v. Acheson*, 195 F.3d 645; *United States v. Hilton*, 167 F.3d 61. In *Mento*, the defendant was charged with possessing "more than one hundred images of naked, prepubescent children in sexually explicit situations." 2000 WL 1648878, at *1. Mento entered a guilty plea to the charges against him and never contested the fact that he "knowingly possessed images of ***actual*** minors." *Id.* at *1, *8 n.5 (emphasis added). In *Acheson*, the defendant was also charged with possessing child pornography. 195 F.3d at 648. Specifically, Acheson was charged with possessing "over 500 computer images of child pornography. . . ." *Id.* Like Mento, Acheson entered a guilty plea to the charges against him and made "no attempt to assert any of [the images at issue were] not real children engaged in sexually explicit situations." *Id.* at 648 n.1. Finally, in *Hilton*, the defendant was charged with possessing "three or more images of child pornography," 167 F.3d at 67, and was ultimately convicted of possessing at least seven such images.[16]

Given the fact that each of the defendants in the *Mento*, *Acheson*, *Hilton* cases were ultimately convicted of possessing images of *actual* children engaged in sexually-explicit situations, the defendants' convictions and, in the case

16. Respondents' counsel obtained information regarding Hilton's trial and conviction from Hilton's counsel.

of *Hilton*, the indictment could not be altered by a determination that the "appears to be" and "conveys the impression" provisions of the CPPA were unconstitutional. In fact, the Fourth Circuit Court of Appeals expressly acknowledged this fact when it stated that it "would uphold Mento's conviction even if [it] determined the statutory language in question to be unconstitutional. . . ." *Mento*, 2000 WL 1648878 at *8 n.5. As such, the courts' opinions as to the constitutionality of these provisions of the CPPA were not necessary to the outcome of those cases and are merely dicta. Dicta does not constitute binding precedent. *See Smith v. Orr*, 855 F.2d 1544, 1550 (Fed. Cir. 1988). Because the holdings of the First, Fourth, and Eleventh Circuits are not binding precedent, they cannot be relied upon to establish an actual conflict.

Accordingly, there is no actual conflict among the federal appellate courts which would warrant the granting of the certiorari in this case.

CONCLUSION

Petitioners have failed to raise any genuine issues of exceptional importance. Accordingly, certiorari should be denied.

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No. 00-795

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

THE FREE SPEECH COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases:

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 9, 10
Ginzburg v. *United States*, 383 U.S. 463 (1966) 8
New York v. *Ferber*, 458 U.S. 747 (1982) 5, 9, 10
Osborne v. *Ohio*, 495 U.S. 103 (1990) 6
United States v. *Acheson*, 195 F.3d 645 (11th Cir. 1999) 1, 3, 4, 6, 8
United States v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999) 1, 3, 6, 8, 9, 10
United States v. *Mento*, 231 F.3d 912 (4th Cir. 2000) 1, 4, 6, 8, 9, 10

Constitution and statute:

U.S. Const. Amend. I 3, 4
Child Pornography Prevention Act of 1996, 18 U.S.C. 2251 *et seq.* 1, 2, 3, 4, 5, 8
18 U.S.C. 2251 3
18 U.S.C. 2251 note (Supp. IV 1998) 2, 6, 7, 9
18 U.S.C. 2252 3
18 U.S.C. 2252A(a)(5)(B) (Supp. IV 1998) 8, 9
18 U.S.C. 2252A(c) (Supp. IV 1998) 9
18 U.S.C. 2256(8)(A) (Supp. IV 1998) 2
18 U.S.C. 2256(8)(B) (Supp. IV 1998) 1
18 U.S.C. 2256(8)(C) (Supp. IV 1998) 2
18 U.S.C. 2256(8)(D) (Supp. IV 1998) 1
18 U.S.C. 2257 10

Miscellaneous:

S. Rep. No. 358, 104th Cong., 2d Sess. (1996) 2, 6

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As we explain in our petition, certiorari is warranted in this case because the court of appeals invalidated two important provisions of the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. 2251 *et seq.* In particular, the court of appeals held unconstitutional the provisions of the CPPA that define child pornography to include (1) any visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(B) (Supp. IV 1998), and (2) any visual depiction that "is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(D) (Supp. IV 1998). Certiorari is also warranted because the court's holding is incorrect and conflicts with the decisions of three other circuits, *United States* v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999); *United States* v. *Acheson*, 195 F.3d 645 (11th Cir. 1999); and *United States* v. *Mento*, 231 F.3d 912 (4th Cir. 2000).

1. Respondents contend (Br. in Opp. 21) that the Court should not grant review because "the court's ruling excised only two limited portions of the statute, leaving the remaining portions of the CPPA in full effect." Respondents' effort to downplay the significance of the court's sweeping ruling ignores the central purpose of the amendments Congress enacted in the CPPA.

The CPPA contains four definitions of child pornography. The decision below entirely invalidates two of those four definitions, and those definitions are the only ones that address the serious dangers to children posed by computer-generated child pornography not involving real children. The two invalidated definitions respond to Congress's specific findings that computer-generated child pornography not involving real children can be used just as effectively by pedophiles to seduce children into sexual activity and to incite their own abusive behavior as child pornography depicting real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Findings 3, 4, 8, 9 and 10). They also respond to Congress's determination that prohibitions against dissemination and possession of child pornography involving real children may soon become effectively unenforceable. S. Rep. No. 358, 104th Cong., 2d Sess. 20 (1996).

Respondents' assertion (Br. in Opp. 21) that Congress's purposes can be fully achieved through the two definitions that are unaffected by the court's ruling is incorrect. The two unaffected definitions address the use of real children in visual depictions of sexually explicit conduct. See 18 U.S.C. 2256(8)(A) (Supp. IV 1998) (defining child pornography as any visual depiction that "involves the use of a minor engaging in sexually explicit conduct"); 18 U.S.C. 2256(8)(C) (Supp. IV 1998) (defining child pornography as any visual depiction that "has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct"). Those definitions either duplicate or mod-

estly expand prohibitions that existed before the enactment of the CPPA. See 18 U.S.C. 2251, 2252. They do nothing to address the dangers posed by computer-generated child pornography that either does not involve real children or that cannot be proven to involve real children.

2. Respondents also contend (Br. in Opp. 24-26) that there is no "actual" conflict in the circuits on the question presented in this case. According to respondents, the decisions in *Hilton*, *Acheson*, and *Mento* contain only "dicta" on the constitutionality of the CPPA. Respondents are mistaken.

In *Hilton*, the district court dismissed an indictment charging the defendant with knowing possession of child pornography, in violation of the CPPA, on the ground that the "appears to be" definition in the CPPA is unconstitutionally vague and overbroad. 167 F.3d at 65, 67. The government appealed, and the sole questions presented were "whether the CPPA's definition of child pornography is so overbroad as to contravene the First Amendment or so vague as to violate due process." *Id.* at 65. The First Circuit squarely resolved those questions on the merits, summarizing its decision as follows: "We hold that the law, properly construed, survives Hilton's facial constitutional challenge. It neither impinges substantially on protected expression nor is so vague as to offend due process." *Ibid.*

In *Acheson*, the defendant pleaded guilty to knowingly receiving and possessing child pornography, in violation of the CPPA, but reserved the right to appeal to challenge the constitutionality of the Act. 195 F.3d at 648. On appeal, the defendant did not contend that he was personally engaged in conduct protected by the First Amendment. *Id.* at 650. Instead, he argued that the CPPA's "appears to be" language renders the CPPA unconstitutionally overbroad and vague and that the district court therefore should have dismissed his indictment. *Id.* at 650, 652. The Eleventh

Circuit entertained the defendant's claims and rejected them on the merits, holding that "[t]he CPPA's overbreadth is minimal when viewed in light of its plainly legitimate sweep," *id.* at 650, and that "the CPPA defines the criminal offense with enough certainty to put an ordinary person on notice of what conduct is prohibited," *id.* at 652.

In *Mento*, the defendant pleaded guilty to possessing child pornography, in violation of the CPPA, but reserved the right to appeal the district court's holding that the CPPA is facially constitutional. 231 F.3d at 915. The Fourth Circuit expressly rejected the defendant's contention that the "appears to be" definition renders the CPPA unconstitutionally overbroad and vague. *Id.* at 921-922. It summarized its decision as follows: "We hold that the CPPA does not impermissibly regulate protected speech and does not, therefore, offend the First Amendment." *Id.* at 923.

Thus, the courts in *Hilton*, *Acheson*, and *Mento* all squarely held that the "appears to be" definition does not render the CPPA facially overbroad or vague. In contrast, the decision below invalidated the "appears to be" definition as unconstitutionally overbroad and vague. Pet. App. 2a. There is therefore a square conflict between the decisions in *Hilton*, *Acheson*, and *Mento* and the decision below.

Respondents assert (Br. in Opp. 25-26) that the constitutional rulings in *Hilton*, *Acheson*, and *Mento* are dicta, because the defendants in those cases possessed (or at least did not dispute that they possessed) visual depictions of real children. None of those courts, however, ruled against the defendant on that ground. Instead, applying settled First Amendment principles, all three courts entertained the defendant's *facial* challenge to the validity of the CPPA, and ruled against the defendant based on a determination that the CPPA is not facially overbroad or vague. Those constitutional rulings therefore constitute square holdings; they do not remotely fall into the category of dicta.

3. Finally, respondents argue (Br. in Opp. 9-20) that the decision below is correct. Respondents' arguments, however, do not demonstrate that the provisions at issue here are unconstitutional, much less that a conflict in the circuits on the constitutionality of an Act of Congress should not be resolved by this Court.

a. Respondents argue (Br. in Opp. 11-12, 14) that *New York* v. *Ferber*, 458 U.S. 747 (1982), holds that the government's compelling interest in regulating child pornography is limited to works involving real children. Respondents derive their reading of *Ferber* from a sentence in the opinion stating that the government's interest is "limited to works that *visually* depict sexual conduct by children below a specified age." 458 U.S. at 764. On its face, however, that sentence does not draw a distinction between pictures of real children and computer-generated images of participants who appear to be children.

Nor does anything else in *Ferber* suggest that the Court intended to prevent Congress from addressing the serious dangers posed to children by computer-generated child pornography. In *Ferber*, the State asserted as its sole interest the prevention of psychological harm to children who are involved in the production of child pornography. Moreover, at the time of *Ferber*, the technology for producing computer-generated images that are virtually indistinguishable from pictures of real children had not yet developed. The Court in *Ferber* therefore had no occasion to decide whether the new dangers to children associated with computer technology could justify prohibitions like those at issue here.

While *Ferber* did not resolve that question, its general framework provides strong support for the constitutionality of the CPPA's prohibitions. The Court identified the compelling interest at issue in that case as the "prevention of sexual exploitation and abuse of children." 458 U.S. at 757.

That interest is advanced by prohibitions against the dissemination and possession of depictions that "appear to be" children engaged in sexually explicit conduct or that "convey[]" such an "impression." As Congress found, pedophiles can use computer-generated child pornography not involving real children as effectively as child pornography involving real children to seduce children into sexual activity and to whet their appetites for sexual abuse. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 8). Moreover, advancing technology makes it increasingly difficult, if not impossible, to prove that a pornographic image involves a real child. S. Rep. No. 358, *supra*, at 20. Accordingly, prohibitions against dissemination and possession of pornographic depictions that appear to be of children or that convey that impression may often be the only effective way to reach persons who disseminate or possess pornography involving real children. Thus, as three courts of appeals have concluded, the prohibitions at issue here are fully consistent with *Ferber*. See *Hilton*, 167 F.3d at 71-73; *Acheson*, 195 F.3d at 651-652; *Mento*, 231 F.3d at 919-921; see also *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990) (one interest supporting a prohibition against possession of child pornography is preventing pedophiles from using pictures of child pornography to seduce children into sexual activity).

b. Respondents also argue (Br. in Opp. 13-14) that there is no evidence to support Congress's findings that prohibitions against computer-generated child pornography advance the government's compelling interest in preventing harm to children. In particular, respondents argue that evidence that pedophiles use child pornography to seduce children into sexual activity and to whet their own appetites for sexual abuse is insufficient to support the prohibitions at issue here, absent specific evidence that pedophiles use computer-generated images as opposed to images of real children to accomplish those purposes. But Congress had

evidence before it, and respondents do not dispute, that computer technology can be used to produce visual depictions "that are virtually indistinguishable from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 5). Congress could rely on that evidence to conclude that computer-generated images in the hands of pedophiles pose precisely the same dangers to children as pictures of real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Findings 8, 9). Indeed, it would be difficult to reach any other conclusion.

For similar reasons, respondents err in contending (Br. in Opp. 6) that there is an insufficient evidentiary basis for Congress's finding that persons who possess and disseminate pornographic images of real children may escape prosecution unless they are prosecuted under the prohibitions at issue here. That conclusion is also supported by Congress's finding that computer-generated images can be produced that are virtually indistinguishable from images of real children. As a matter of logic, when the government's evidence consists of the images themselves, a defendant will almost always be able to argue that there is a reasonable doubt concerning whether the images are of real children or of participants who only appear to be children.

c. Respondents also err in contending (Br. in Opp. 14) that the prohibitions at issue here are not narrowly tailored. Those prohibitions are narrowly tailored to address the dangers that flow from computer-generated images of child pornography that are virtually indistinguishable from images involving real children. Respondents identify no less restrictive alternative that would address those dangers as well.

d. Respondents argue (Br. in Opp. 15-17) that the provisions at issue here are unconstitutionally vague. According to respondents (*id.* at 16), the Act leaves a person wondering

"Appears to whom to be a minor?" That criticism is unpersuasive.

First, the relevant inquiry under the "appears to be" provision is whether "a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity." *Hilton*, 167 F.3d at 75; *Acheson*, 195 F.3d at 652; see also *Mento*, 231 F.3d at 922. In a large core of cases, the physical characteristics of the depicted participants will match the physical characteristics of prepubescent children. In such cases, a person can have no difficulty understanding that the depictions are prohibited. Second, the CPPA's scienter requirement further reduces any danger that the Act will serve as a trap for the unwary. Unless the government can prove that the defendant knew that the child appeared to be under the age of 18, the defendant must be acquitted. *Hilton*, 167 F.3d at 75 (citing 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 1998)); *Acheson*, 195 F.3d at 653. Respondents' vagueness argument ignores both of those features of the Act.

For similar reasons, the "conveys the impression" provision is not unconstitutionally vague. The relevant inquiry is also easily understood: the question is whether a reasonable unsuspecting viewer would conclude from the way the depiction is advertised, promoted, presented, described, or distributed that the person depicted is under the age of 18. In most cases, that inquiry can be readily answered. In addition to the physical characteristics of the participants, the language used to market the depiction will help to establish whether the applicable standard is satisfied. *Cf. Ginzburg* v. *United States*, 383 U.S. 463 (1966) (holding that the government may prosecute a business for engaging in the "pandering" of sexually explicit materials). And the scienter requirement further narrows the prohibition to those who know that the material has been marketed in a

prohibited manner. 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 1998).

e. Respondents also contend (Br. in Opp. 17-20) that the Act is unconstitutionally overbroad because it reaches visual depictions of what appear to be children engaged in sexual activity even when such depictions are necessary for literary or artistic value. That concern is misguided. The Act is aimed at visual depictions of children engaged in sexually explicit conduct. A large core of that material has no serious literary or artistic value. Moreover, the Act does not reach drawings, cartoons, sculptures, and paintings that depict youthful-looking persons in sexual poses. *Hilton*, 167 F.3d at 72; *Mento*, 231 F.3d at 922. And the Act also supplies an affirmative defense for persons who disseminate visual depictions involving adults who appear to be children provided that such material is not marketed as child pornography, 18 U.S.C. 2252A(c) (Supp. IV 1998). Because the Act is aimed at a large core of material that has no serious literary or artistic value, and leaves open ample opportunities for the creation of sexually explicit works having serious literary or artistic value, the Act is not substantially overbroad. *Ferber*, 458 U.S. at 773-774; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973).

Respondents argue (Br. in Opp. 18) that the Act does reach drawings, cartoons, sculptures, and paintings of youthful-looking persons in sexually explicit poses. Respondents' expansive reading of the Act, however, is unjustified. As Congress's findings demonstrate, Congress understood the terms "appears to be a minor" and "conveys the impression" of a minor to refer to depictions that are virtually indistinguishable from unretouched photographs of real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 5). Drawings, cartoons, sculptures and paintings of youthful-looking persons engaged in sexual activity do not satisfy that

standard. The Act therefore does not cover such artistic works. *Hilton*, 167 F.3d at 72; *Mento*, 231 F.3d at 922.

Respondents' objections (Br. in Opp. 19-20) to the affirmative defense for distributors are also unpersuasive. Respondents argue (*id.* at 19) that the affirmative defense for distributors does not protect artists who create sexually explicit images out of their imaginations. But such artists have the option of either (1) creating drawings, cartoons, sculptures or paintings, or (2) using adults as models, provided that they do not market the depictions as child pornography. For similar reasons, the Act's failure to afford an affirmative defense to persons who do not know how an image is created (*ibid.*) does not demonstrate substantial overbreadth. Such persons can distribute and possess drawings, cartoons, sculptures, and paintings, and distribute depictions that they know involve adults and are not marketed as child pornography. See 18 U.S.C. 2257 (requiring producers of matter containing visual depictions of sexually explicit conduct to create and maintain records pertaining to each of the performers in such depictions to ensure that they are not minors).

In sum, the Act is not substantially overbroad. Whatever overbreadth may exist can be cured through case-by-case adjudication. *Ferber*, 458 U.S. at 774; *Broadrick*, 413 U.S. at 615- 616.

* * * * *

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

JANUARY 2001

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QUESTION PRESENTED

The Child Pornography Prevention Act of 1996 (CPPA), prohibits, *inter alia*, the shipment, distribution, receipt, reproduction, sale, or possession of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(B) (Supp. V 1999). It also contains a similar prohibition concerning any visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(D) (Supp. V 1999). The question presented is whether those prohibitions violate the First Amendment to the Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners are John D. Ashcroft, Attorney General of the United States, and the United States Department of Justice. Respondents are The Free Speech Coalition, Bold Type, Inc., Jim Gingerich, and Ron Raffaelli.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	13
Argument:	
The "appears to be" and "conveys the impression" provisions of the Child Pornography Prevention Act are consistent with the First Amendment	17
A. Depictions that are virtually indistinguishable from depictions of real children engaged in sexually explicit conduct are unprotected by the First Amendment	19
B. The court of appeals' reasons for concluding that the government does not have authority to regulate the depictions at issue are unpersuasive	27
C. The provisions at issue are not unconstitutionally vague	40
D. The provisions at issue are not substantially overbroad	42
Conclusion	45

TABLE OF AUTHORITIES

Cases:

Brandenburg v. *Ohio*, 395 U.S. 444 (1969)	31
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	17, 43, 44
Burke v. *State*, 27 S.W.3d 651 (Tex. Ct. App. 2000), petition for discretionary review refused, Nos. 00-1869 & 00-1870 (Tex. Crim. App. Dec. 6, 2000)	35

Cases—Continued: Page

Burson v. *Freeman*, 504 U.S. 191 (1992) 33
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 19
Erie v. *Pap's A.M.*, 529 U.S. 277 (2000) 25, 33
Giboney v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949) 30
Ginzburg v. *United States*, 383 U.S. 463 (1966) 18
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 40
Jenkins v. *Georgia*, 418 U.S. 153 (1974) 25
Kansas v. *Hendricks*, 521 U.S. 346 (1997) 32
Kolender v. *Lawson*, 461 U.S. 352 (1983) 40
Miller v. *California*, 413 U.S. 15 (1973) 2, 19, 42
People v. *Chastain*, 733 P.2d 1206 (Colo. 1987) 30
New York v. *Ferber*, 458 U.S. 747 (1982) ..... *passim*
Osborne v. *Ohio*, 495 U.S. 103 (1990) 3, 24, 31, 35
Renton v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986) 33
Roth v. *United States*, 354 U.S. 476 (1957) 19
Texas v. *Cobb*, No. 99-1702 (Apr. 2, 2001) 29
Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997) 33
United States v. *Acheson*, 195 F.3d 645 (11th Cir. 1999) 18, 22, 23, 26, 41, 45
United States v. *Coleman*, No. ARMY 9801240, 2001 WL 55523 (Army Ct. Crim. App. Jan. 24, 2001) 38
United States v. *Fox*, No. 00-40034, 2001 WL 370045 (5th Cir. Apr. 13, 2001) 18, 22, 24, 26, 27, 37, 41, 44-45
United States v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999) 18, 22, 23, 24, 25, 26, 31, 41, 45

Cases—Continued: Page

United States v. *Kimbrough*, 69 F.3d 723 (5th Cir. 1995), cert. denied, 517 U.S. 1157 (1996) 37
United States v. *Mento*, 231 F.3d 912 (4th Cir. 2000), petition for cert. pending, No. 00-8114 ..... 18, 22, 23, 24, 25, 27, 29, 41
United States v. *Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) 19
United States v. *Snyder*, 189 F.3d 640 (7th Cir. 1999), cert. denied, 527 U.S. 1097 (2000) 35
United States v. *Vig*, 167 F.3d 443 (8th Cir.), cert. denied, 528 U.S. 859 (1999) 38
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 41

Constitution and statutes:

U.S. Const.:
Amend. I ..... *passim*
Amend. V (Due Process Clause) 40
Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 121, 110 Stat. 3009-26 to 3009-31 4
18 U.S.C. 2251 (1994 & Supp. V 1999) 3
18 U.S.C. 2251 note (Supp. V 1999) 4-5, 6, 18, 21, 22, 23, 40
18 U.S.C. 2252 (1994 & Supp. V 1999) 3
18 U.S.C. 2252A (Supp. V 1999) 17, 18, 24
18 U.S.C. 2252A(a) (Supp. V 1999) 6
18 U.S.C. 2252A(a)(1)–(5) (Supp. V 1999) 41
18 U.S.C. 2252A(b)(1) (Supp. V 1999) 8
18 U.S.C. 2252A(b)(2) (Supp. V 1999) 8
18 U.S.C. 2252A(c) (Supp. V 1999) 7, 9, 12, 26, 28, 44
18 U.S.C. 2252(A)(c)(3) (Supp. V 1999) 25
18 U.S.C. 2256(8)(A) (Supp. V 1999) 6
18 U.S.C. 2256(8)(B) (Supp. V 1999) 7, 17
18 U.S.C. 2256(8)(C) (Supp. V 1999) 6
18 U.S.C. 2256(8)(D) (Supp. V 1999) 7, 18

Statutes—Continued: Page

Child Protection Act of 1984, Pub. L. No. 98-282, 98 Stat. 204:
- § 4(3), 98 Stat. 204 2
- § 5(a)(1), 98 Stat. 205 2
- § 5(a)(5), 98 Stat. 205 2

Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, § 7513, 102 Stat. 4487 (18 U.S.C. 2257) 3, 41

Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323(a)(2), 104 Stat. 4818 3

Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 2
- § 2(a), 92 Stat. 8 2
- 18 U.S.C. 2256(1) 7
- 18 U.S.C. 2256(2) 7, 26
- 18 U.S.C. 2256(2)(A) 43
- 18 U.S.C. 2256(2)(E) 43

Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 203(a)(2), 112 Stat. 2978 (18 U.S.C. 2252A(d)(Supp. V 1999)) 8

18 U.S.C. 1028(a)(6) (1994 & Supp. V 1999) 42

Ariz. Rev. Stat. Ann. § 13-3555 (West 2000) 8

Del. Code Ann. tit. 11 § 1103(e) (Supp. 2000) 8

Minn. Stat. Ann. § 617.246(f)(2)(iii) (West 2001) 8

Mo. Ann. Stat. § 573.035 (West 2001) 8

N.Y. Penal Law § 263.15 (McKinney 1980) 19, 27

Criminal Code, R.S.C., ch. C-46, § 163.1(1)(a)(i) (1998) (Can.) 9

Protection of Children Act, 1978, § 7(8), amended by Criminal Justice and Public Order Act, 1994, § 84(3)(c)(8) (Eng.) 8-9

Miscellaneous: Page

Ronald Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 483 (1996) 32, 36, 37

Attorney General's Commission on Pornography, *Final Report* (July 1986) 3, 34, 38

Daniel Campagna & Donald Poffenberger, *The Sexual Trafficking in Children: An Investigation of the Child Sex Trade* (1988) 35

Child Pornography and Pedophilia, S. Rep. No. 537, 99th Cong., 2d Sess. (1986) 3, 35, 36, 38, 39

Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess. (1996) ..... *passim*

Seth Goldstein, *The Sexual Exploitation of Children: A Practical Guide To Assessment, Investigation, and Intervention* (2d ed. 1999) 35, 36

H.R. Rep. No. 536, 98th Cong., 1st Sess. (1983) 38

Kenneth Lanning, *Collectors, in Child Pornography and Sex Rings* (Ann Burgess et al. eds., 1984) 38, 39

Shirley O'Brien, *Child Pornography* (1983) 35

S. Rep. No. 358, 104th Cong., 2d Sess. (1996) 4, 6, 22, 23, 24, 37, 39, 44

Tim Tate, *Child Pornography: An Investigation* (1990) 35

Webster's Third New International Dictionary (1976) 42

In the Supreme Court of the United States

No. 00-795

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

THE FREE SPEECH COALITION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 198 F.3d 1083. The opinion of the district court (Pet. App. 50a-65a) is unreported. The order denying rehearing (Pet. App. 44a-49a) is reported at 220 F.3d 1113.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1999. A petition for rehearing was denied on July 19, 2000 (Pet. App. 44a-45a). On October 10, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 16, 2000. The petition was filed on that date and was granted on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The pertinent provisions of the Child Pornography Prevention Act of 1996 are reproduced in an appendix to the petition for a writ of certiorari. See Pet. App. 67a-76a.

STATEMENT

1. a. For almost a quarter of a century, Congress has sought to combat the harm to children caused by the production and distribution of child pornography. Congress first addressed the subject of child pornography in the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7. That Act made it a crime for any person to induce a child under 16 years of age to engage in "sexually explicit conduct" in order to produce a visual depiction of such conduct. § 2(a), 92 Stat. 8. The 1977 Act also made it a crime for any person to distribute for commercial gain any obscene depiction of a minor engaged in sexually explicit conduct. *Ibid.*

In response to this Court's decision in *New York* v. *Ferber*, 458 U.S. 747 (1982), which sustained the constitutionality of a state statute that prohibited the dissemination of child pornography that did not satisfy the standards for obscenity under *Miller* v. *California*, 413 U.S. 15 (1973), Congress enacted the Child Protection Act of 1984, Pub. L. No. 98-292, §§ 4(3), 5(a)(1) and (5), 98 Stat. 204-205. In that Act, Congress eliminated the requirement that the depictions must be obscene, removed the requirement that the depictions be distributed for a commercial purpose, and raised the age of minority from 16 to 18.

In 1986, the Attorney General's Commission on Pornography issued a report on child pornography and made

recommendations for improving federal law enforcement efforts. Attorney General's Commission on Pornography, *Final Report* 405-418, 595-735 (July 1986). That same year, the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs reported on its investigation into the activities of child pornographers and pedophiles. See *Child Pornography and Pedophilia*, S. Rep. No. 537, 99th Cong., 2d Sess. (1986).

Drawing upon the information and recommendations contained in those reports, Congress enacted the Child Protection and Obscenity Enforcement Act of 1988. That law adopted the Pornography Commission's recommendation that producers of sexually explicit visual depictions be required to create and maintain records of the identities and ages of their performers. Pub. L. No. 100-690, § 7513, 102 Stat. 4487 (adding 18 U.S.C. 2257). See Attorney General's Commission on Pornography, *Final Report* at 618-623. In 1990, following the decision in *Osborne* v. *Ohio*, 495 U.S. 103 (1990), which upheld a state prohibition against possession of child pornography, Congress amended federal law to prohibit the possession of visual depictions of children engaged in sexually explicit conduct. Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323(a)(2), 104 Stat. 4818.

b. The prohibitions discussed above apply only to visual depictions of actual children engaged in sexually explicit conduct. See 18 U.S.C. 2251, 2252 (1994 & Supp. V 1999). With advances in computer technology, Congress became concerned that persons could create visual depictions of children engaged in sexual activity that might not involve the participation of any actual child, but that would nonetheless pose serious dangers for children. After holding hearings on that subject, see *Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996) (*Senate Hearing*), Congress

enacted the Child Pornography Prevention Act of 1996 (CPPA). Pub. L. No. 104-208, Div. A, Tit. I, § 121, 110 Stat. 3009-26 to 3009-31. As part of that Act, Congress enacted 13 findings that explain why it enacted the CPPA. The Senate Report accompanying the CPPA elaborates on those findings. S. Rep. No. 358, 104th Cong., 2d Sess. (1996).

Congress found that "new photographic and computer [imaging] technologies make it possible to produce * * * visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5). Congress also found that, even when actual children are used, computers can "alter sexually explicit [depictions] in such a way as to make it virtually impossible * * * to identify individuals, or to determine if the offending material was produced using children." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 6(A)). The Senate Report describes one way that computer images of child pornography are created: innocent pictures of children are taken from books, magazines, catalogs, or videos; the images are then loaded onto a computer; and the original pictures are then transformed through a process known as "morphing" into pictures depicting children engaged in sexually explicit conduct. S. Rep. No. 358, *supra*, at 15-16.

Congress considered the development of computer-generated child pornography extraordinarily troubling for several reasons. First, Congress determined that "child pornography is often used as part of a method of seducing other children into sexual activity." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 3). In particular, "a child who is reluctant to engage in sexual activity with an adult * * * can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." 18

U.S.C. 2251 note (Supp. V 1999) (Finding 3). Congress found that computer-generated images of children engaged in sexually explicit conduct can be just as effective in seducing children into sexual activity as photographic images of real children. 18 U.S.C. 2251 note (Supp. V 1999) (Finding 8).

Second, Congress found that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites" and that "such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 4). Congress found that child pornography can have that effect, regardless of whether the pornography takes the form of computer-generated images or photographs of real children. 18 U.S.C. 2251 note (Supp. V 1999) (Finding 8).

Third, because computers can alter sexually explicit depictions so as to make it "virtually impossible * * * to identify individuals, or to determine if the offending material was produced using children," 18 U.S.C. 2251 note (Supp. V 1999) (Finding 6(A)), Congress was concerned that the prohibitions against the distribution and possession of child pornography involving real children could become unenforceable. As explained in the Senate Report:

> As the technology of computer-imaging progresses, it will become increasingly difficult, if not impossible, to distinguish computer-generated from photographic depictions of child sexual activity. It will therefore become almost impossible for the Government to meet its burden of proving that a pornographic image is of a real child. Statutes prohibiting the possession of child pornography produced using actual children would be rendered unenforceable and pedophiles who possess

pornographic depictions of actual children will go free from punishment.

S. Rep. No. 358, *supra*, at 20.

Fourth, Congress heard evidence that computer-generated images of children engaged in sexually explicit conduct are often exchanged for pictures of real children engaged in such conduct. *Senate Hearing* 20, 23, 30, 35, 90. Congress learned that, because of that phenomenon, the production and distribution of computer-generated child pornography helps to sustain the market for the production of visual depictions that involve real children. *Id.* at 91.

Congress concluded that the government has a "compelling" interest in "the elimination of child pornography and the protection of children from sexual exploitation." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 13). That interest, Congress further concluded, extends not only to depictions of actual children engaged in sexually explicit conduct, but also to depictions that "are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 13).

c. The CPPA imposes criminal penalties on the knowing shipment, receipt, distribution, reproduction, sale, or possession of "child pornography." 18 U.S.C. 2252A(a) (Supp. V 1999). In provisions that are not at issue here, the CPPA defines "child pornography" as "any visual depiction * * * of sexually explicit conduct," where "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(A) (Supp. V 1999), or "has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(C) (Supp. V 1999). In the provisions at issue here, the CPPA also defines child pornography as any visual depiction of sexually explicit conduct that "is,

or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(B) (Supp. V 1999) (emphasis added), or "is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(D) (Supp. V 1999) (emphasis added). The "appears to be" and the "conveys the impression" provisions respond to Congress's findings concerning the dangers to children posed by computer-generated images of children engaged in sexually explicit conduct.

As under prior law, the CPPA defines "sexually explicit conduct" as "actual or simulated - (A) sexual intercourse * * * ; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2). Likewise, "minor" remains defined as "any person under the age of eighteen years." 18 U.S.C. 2256(1).

The CPPA contains affirmative defenses that limit its reach. The Act provides that it shall be an affirmative defense to a charge of unlawful shipment, receipt, distribution, reproduction, or sale of child pornography that "the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct, * * * each such person was an adult at the time the material was produced; and * * * the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(c) (Supp. V 1999). A separate subsection, added in 1998, provides that it shall be an affirmative defense to a charge of unlawful possession of child pornography that the defendant possessed "less than three matters containing visual depiction proscribed by that paragraph," and "promptly and in good faith * * * took

reasonable steps to destroy each such visual depiction," or "reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction." Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 203(a)(2), 112 Stat. 2978 (codified at 18 U.S.C. 2252A(d) (Supp. V 1999)).

A conviction on a charge relating to the shipment, receipt, distribution, reproduction, or sale of child pornography carries a maximum penalty of 15 years' imprisonment, unless the defendant has a prior conviction relating to child pornography, in which case the sentence shall be no less than five years' and no more than 30 years' imprisonment. 18 U.S.C. 2252A(b)(1) (Supp. V 1999). A conviction on a charge of possession of child pornography carries a maximum penalty of five years' imprisonment, unless the defendant has a prior conviction relating to child pornography, in which case the sentence shall be no less than two years' and no more than 10 years' imprisonment. 18 U.S.C. 2252A(b)(2) (Supp. V 1999).[1]

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[1] Several States have enacted statutes criminalizing depictions that appear to be of children engaged in sexual activity. See, *e.g.*, Minn. Stat. Ann. § 617.246(f)(2)(iii) (West 2001) (defining pornographic work to mean any visual depiction that "is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct"); Mo. Ann. Stat. § 573.035 (West 2001) (prohibiting the promotion of child pornography that "portrays what appears to be a minor as a participant or observer of sexual conduct"); Del. Code Ann. tit. 11 § 1103(e) (Supp. 2000) (defining child to mean "any individual who is intended by the defendant to appear to be 14 years of age or less"); Ariz. Rev. Stat. Ann. § 13-3555 (West 2000) (forbidding persons depicted as a participant in sexual conduct "to masquerade as a minor," or to produce or distribute visual depictions "whose text, title or visual representation depicts a participant in any exploitive exhibition or sexual conduct as a minor even though any such participant is an adult"). In addition, England and Canada have amended their child pornography laws to reach depictions that appear to be of children. See Protection of Children Act, 1978, § 7(8), amended by Criminal Justice and Public Order Act, 1994, § 84(3)(e)(8) (Eng.) (reaching "pseudo-photograph" created by computer "[i]f the impression conveyed by a pseudo-photograph is that the person shown is a child"); Criminal Code, R.S.C., ch. C-46, § 163.1(1)(a)(i)(1998) (Can.) (banning visual representations that show a person "who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity").

2. After the CPPA was signed into law, the Free Speech Coalition and others (respondents) filed suit in the Northern District of California against the Attorney General of the United States and the United States Department of Justice. Pet. App. 3a. The Free Speech Coalition is "a trade association of businesses involved in the production and distribution of 'adult-oriented materials;'" the other respondents are a publisher of a book on nudism, an artist who paints nudes, and a photographer who specializes in erotic photography. *Ibid.* Respondents alleged that the "appears to be" and the "conveys the impression" provisions of the CPPA are vague and overbroad in violation of the First Amendment. *Id.* at 50a, 54a.[2]

On cross-motions for summary judgment, the district court first determined that respondents have standing to raise their claims. Pet. App. 54a-56a. The court noted that, because respondents allege that they use only adults in their works and that they do not market their works as child pornography, their works fall within the Act's affirmative defense in Section 2252A(c). *Id.* at 54a. The court nonetheless ruled that respondents have standing based on their allegations that the challenged prohibitions have caused them to refrain from distributing certain works. *Id.* at 55a-56a.

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[2] Respondents also alleged that the CPPA constitutes a prior restraint on speech. Pet. App. 50a. The district court rejected that claim, *id.* at 65a, the court of appeals affirmed that ruling, *id.* at 27a, and that claim is not at issue here.

On the merits, the court concluded that the CPPA is "content-neutral," because it is designed to counteract the effect that child pornography has on innocent children and not to regulate ideas. Pet. App. 57a-58a. The court therefore reviewed the prohibitions at issue under the standard applicable to content-neutral regulations that incidentally burden speech. The court held that the prohibitions satisfy that standard. The court concluded that the challenged provisions "clearly advance[] important and compelling government interests: the protection of children from the harms brought on by child pornography and the industry that such pornography has created." *Id.* at 58a. The court further concluded that the prohibitions "burden[] no more speech than necessary in order to protect children from the harms of child pornography." *Id.* at 59a.

The district court also held that the "appears to be" and the "convey[s] the impression" prohibitions are not unconstitutionally overbroad. Pet. App. 63a-64a. The court concluded that, under a fair reading of the Act and its affirmative defenses, it is "highly unlikely" that the Act would prevent the production of "valuable works." *Id.* at 62a-63a. The court also held that the CPPA is not unconstitutionally vague. *Id.* at 63a-64a.

3. The court of appeals reversed. Pet. App. 1a-43a. The court agreed with the district court that respondents have standing based on respondents' allegations that they ceased distributing certain material because they feared prosecution. *Id.* at 12a. On the merits, the court of appeals held that the "appears to be" and "convey[s] the impression" prohibitions "do not meet the requirements of the First Amendment." *Id.* at 2a.

a. The court of appeals first held that the CPPA restricts speech based on its content, Pet. App. 13a, and that the government was therefore required to show that the "appears to be" and "convey[s] the impression" provisions are

narrowly tailored to further a compelling interest. *Id.* at 15a. Finding that those provisions are not supported by a compelling interest, the court ruled that the government failed to sustain that burden. *Id.* at 15a-23a.

The court of appeals read *New York* v. *Ferber*, 458 U.S. 747 (1982), to hold that "Congress has no compelling interest in regulating sexually explicit materials that do not contain visual images of actual children." Pet. App. 17a. The court also drew from *Ferber* the principle that government may not regulate child pornography based on the effect such images have on those who view them. *Id.* at 16a-17a. Applying that understanding of *Ferber*, the court ruled that "any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions." *Id.* at 19a. The court also concluded that there is not a "demonstrated basis to link computer-generated images with harm to real children." *Id.* at 20a. Absent such a link, the court reasoned, "the law does not withstand constitutional scrutiny." *Ibid.*

The court of appeals next held that the CPPA is unconstitutionally vague. Pet. App. 23a-24a. It explained that the phrases "appears to be" and "convey[s] the impression" are "highly subjective" and that a person of ordinary intelligence "could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution." *Id.* at 24a.

The court also held that the CPPA is unconstitutionally overbroad. Pet. App. 25a-27a. The court reiterated its earlier conclusion that Congress may only regulate depictions of child pornography that involve real children, and then concluded that "the CPPA is insufficiently related" to that interest "to justify its infringement of protected speech." *Ibid.*

b. Judge Ferguson dissented. Pet. App. 29a-43a. Judge Ferguson first faulted the majority for failing to recognize the government's legitimate interests in prohibiting the dissemination of images that can be used to seduce children into sexual activity, destroying the child pornography market, and ensuring that the prohibitions against the use of real children in sexually explicit depictions are not effectively undermined. *Id.* at 32a-35a. Judge Ferguson also criticized the majority for "ignor[ing] the fact that child pornography, real or virtual, has little or no social value." *Id.* at 35a. Because "Congress' interests in destroying the child pornography market and in preventing the seduction of minors outweigh virtual child pornography's exceedingly modest social value," *id.* at 37a-38a, Judge Ferguson concluded, "virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment." *Id.* at 38a.

Judge Ferguson also disagreed with the majority's holding that the CPPA is unconstitutionally overbroad. Pet. App. 38a-41a. In his view, because the Act targets only those images that are "indistinguishable" from unretouched photographic images of actual children, it does not reach "everyday artistic expressions like paintings, drawings, and sculptures that depict youthful looking subjects in a sexual manner." *Id.* at 39a. Judge Ferguson also noted that one of the Act's affirmative defenses, in Section 2252A(c), would shield photographic images of youthful-looking adults in sexual poses, so long as they are not marketed as child pornography. *Id.* at 40a. Any possible impermissible applications of the CPPA, Judge Ferguson explained, should be resolved on a case-by-case basis. *Id.* at 40a-41a.

Finally, Judge Ferguson concluded that the CPPA is not unconstitutionally vague. Pet. App. 41a-43a. As he read the Act, the inquiry into whether an image appears to be a minor is an objective one: The question is "whether an unsuspecting viewer would consider the depiction to be an actual individual under the age of eighteen engaging in sexual activity." *Id.* at 42a (citation omitted). Judge Ferguson noted that the CPPA's scienter requirement provides an additional safeguard against arbitrary enforcement. *Id.* at 42a-43a.

c. The government's petitions for rehearing and rehearing en banc were denied. Pet. App. 44a-45a. Judge Ferguson would have granted rehearing and recommended granting the suggestion for rehearing en banc. *Id.* at 44a. Judge Wardlaw (joined by Judges O'Scannlain and T.G. Nelson) dissented from the denial of rehearing en banc. *Id.* at 45a-49a. Agreeing with the points made in Judge Ferguson's dissent, Judge Wardlaw concluded that the panel majority had impermissibly "elevate[d] the free speech rights of pedophiles over the compelling governmental interest in protecting our children." *Id.* at 49a.

SUMMARY OF ARGUMENT

The Child Pornography Prevention Act of 1996 (CPPA) is the product of Congress's determination that advances in computer technology make possible the creation of images that are virtually indistinguishable from depictions of real children engaged in sexually explicit conduct. The statute embodies Congress's judgment, based on abundant evidence, that such depictions are intrinsically related to the sexual abuse of real children. Under the analysis applied in *New York* v. *Ferber*, 458 U.S. 747 (1982), that form of child pornography, like child pornography involving real children, is unprotected by the First Amendment. The court of appeals therefore erred in facially invalidating the prohibitions against the dissemination and possession of such depictions. Indeed, four courts of appeals have rejected First Amendment challenges to those prohibitions.

A. In *Ferber*, the Court held that visual depictions of actual children engaged in sexual activity constitute a distinct category of speech that is unprotected by the First Amendment. Three principal considerations led the Court to reach that conclusion: The government's interest in protecting children from sexual abuse is "compelling." 458 U.S. at 756-757. The distribution of depictions of children engaged in sexually explicit conduct is "intrinsically related" to the sexual abuse of children. *Id.* at 759. And the value of such depictions is "exceedingly modest, if not *de minimis*." *Id.* at 762.

Those same considerations lead to the conclusion that the material covered by the CPPA is also unprotected. First, the governmental interest at stake is the "compelling" one of protecting children from sexual exploitation. Second, the depictions at issue are "intrinsically related" to the sexual abuse of children: Pedophiles use such depictions to seduce other children into sexual activity and to whet their appetites for sexual abuse; the existence of such material makes it far more difficult to establish that a pornographic image is of a real child, endangering the government's ability to enforce existing child pornography laws; and such material is exchanged for pictures of real children engaged in sexually explicit conduct, and adds fuel to the underground market for child pornography. Finally, the value of depictions of children engaged in sexually explicit conduct is exceedingly modest, if not *de minimis*. Thus, like depictions of real children engaged in sexually explicit conduct, depictions that are virtually indistinguishable from such depictions are categorically unprotected by the First Amendment.

For essentially the same reasons, even if the provisions at issue triggered strict scrutiny, they would still be constitutional. The CPPA covers an exceedingly narrow range of depictions of children engaging in sexually explicit conduct. The CPPA substantially furthers in a number of respects the

government's compelling interest in preventing the sexual exploitation of children. And there are no less restrictive means of advancing the government's compelling interest in protecting children from sexual abuse. The CPPA therefore survives strict First Amendment scrutiny as well.

B. The court of appeals' reasons for concluding that the prohibitions at issue are not supported by a compelling interest are unpersuasive. Contrary to the court of appeals' understanding, *Ferber* did not hold that the government's sole compelling interest is in regulating depictions involving real children. The state statute at issue in *Ferber* applied only to depictions of sexual conduct by actual children, and at the time of the decision in that case, the technology for producing computer-generated images that are virtually indistinguishable from photographs of real children had not yet developed. The Court therefore had no occasion to decide whether the dangers to children associated with new computer technology justify prohibitions like those enacted in the CPPA. Under the legal analysis the Court applied in deciding that child pornography involving real children is not protected by the First Amendment, however, the child pornography at issue here is also unprotected by the First Amendment.

The court of appeals also concluded that the First Amendment precludes the government from relying on interests that depend on the effect of the material on the audience. But the government's interest in ensuring that the prohibitions against child pornography depicting real children are not rendered unenforceable does not depend on the effect of the material on the audience. The same is true of the government's interest in preventing virtual child pornography from fueling the market for child pornography involving real children. The court of appeals simply ignored those vital interests.

Moreover, Congress's interest in preventing pedophiles from using child pornography to seduce children into performing sexual acts legitimately rests on Congress's judgment that child pornography is a common tool of crime. It is true that the success of child pornography as a tool of crime depends on its effect on the children who view it. But there is no First Amendment right to distribute such material to children or, more generally, to use speech to facilitate a crime.

Congress also legitimately considered the fact that pedophiles use child pornography to whet their own appetites for sexual abuse. Regulating speech based on its potential to incite unlawful conduct ordinarily raises First Amendment concerns. But in this case, the unusual vulnerability of children, the secretive nature of child abuse, and the *de minimis* value of the speech, overcome such concerns. In any event, the three other independent justifications for the prohibitions at issue are more than sufficient to sustain their constitutionality.

The court of appeals also concluded that Congress had failed to establish a sufficient factual link between child pornography and sexual abuse. The court, however, failed to accord the deference to Congress's findings required by this Court's decisions. Moreover, the court ignored abundant evidence that supports Congress's findings.

C. The CPPA is not unconstitutionally vague. Persons of ordinary intelligence can discern whether a depiction is virtually indistinguishable from a photograph of a real child engaged in sexually explicit conduct. Contrary to the court of appeals' view, that statutory standard is objective rather than subjective. The question is whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity. That question can be readily answered in the vast majority of cases based on the physical characteristics of the

persons depicted and the way in which the material is promoted. The Act's requirement that any violation must be knowing further diminishes any vagueness concern.

D. Finally, the CPPA is not unconstitutionally overbroad. The statute's "legitimate reach" plainly "dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. The statute is aimed at hard core child pornography and does not apply to innocuous images of naked children. Nor does it reach drawings, cartoons, sculptures, or paintings depicting youthful persons in sexually explicit poses. There may be a limited class of cases in which it might be necessary to use material covered by the CPPA in order to produce educational, medical, or artistic works. But there is no reason to think that the "arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Ferber*, 458 U.S. at 773. In these circumstances, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 773-774 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973)).

ARGUMENT

THE "APPEARS TO BE" AND "CONVEYS THE IMPRESSION" PROVISIONS OF THE CHILD PORNOGRAPHY PREVENTION ACT ARE CONSISTENT WITH THE FIRST AMENDMENT

Two central provisions of the CPPA are at issue here. The first prohibits the dissemination and possession of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(B) (Supp. V 1999). The other prohibits the dissemination and possession of any visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a

visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A, 2256(8)(D) (Supp. V 1999). The court of appeals in this case invalidated both prohibitions on First Amendment grounds. That ruling conflicts with the decisions of four other circuits. See *United States* v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999); *United States* v. *Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States* v. *Mento*, 231 F.3d 912 (4th Cir. 2000), petition for cert. pending, No. 00-8114; *United States* v. *Fox*, No. 00-40034, 2001 WL 370045 (5th Cir. Apr. 13, 2001).

The court of appeals erred in invalidating the "appears to be" and "conveys the impression" prohibitions. Congress intended for both prohibitions to reach a narrow category of material—depictions that are "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5); see also 18 U.S.C. 2251 note (Supp. V 1999) (Findings 8, 13).[3] As we now demonstrate, that limited category of material is not protected by the First Amendment; the challenged prohibitions are constitutional even if they trigger strict scrutiny; and the prohibitions are neither unconstitutionally vague nor substantially overbroad.

[3] The principal difference between the two provisions is that the "conveys the impression" provision requires the jury to assess the material at issue in light of the manner in which it is promoted. Thus, under the "conveys the impression" provision, in close cases, a jury may find that the material at issue is child pornography based on the way it is promoted, even if the material might not constitute child pornography if promoted in a different manner. Cf. *Ginzburg* v. *United States*, 383 U.S. 463, 474-476 (1966).

A. Depictions That Are Virtually Indistinguishable From Depictions Of Real Children Engaged In Sexually Explicit Conduct Are Unprotected By The First Amendment

1. Legislation that restricts speech based on its content is ordinarily subject to strict scrutiny and may be upheld only if it is narrowly tailored to further a compelling interest. *United States* v. *Playboy Entm't Group*, 529 U.S. 803, 813 (2000). There are, however, "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," and "[t]hese include the lewd and obscene." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942) (footnote omitted). "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572.

In *Roth* v. *United States*, 354 U.S. 476, 485 (1957), the Court expressly held that "obscenity is not within the area of constitutionally protected speech or press." In *Miller* v. *California*, 413 U.S. 15 (1973), the Court reaffirmed that holding. *Id.* at 23-24. *Miller* also defined the category of expression that is unprotected as works which, taken as a whole, appeal to the prurient interest, portray sexual conduct in a patently offensive way, and do not have any serious literary, artistic, political, or scientific value. *Id.* at 24.

In *New York* v. *Ferber*, 458 U.S. 747 (1982), the Court held that visual representations of sexual performances by children under 16 years of age, see N.Y. Penal Law § 263.15 (McKinney 1980), are also "without the protection of the First Amendment." 458 U.S. at 764. The Court concluded that such child pornography lacks First Amendment protection whether or not it is obscene under *Miller*. *Id.* at 761, 764-765. Three principal considerations led the Court to hold

that child pornography constitutes a distinct category of unprotected speech.

First, the government's "interest in 'safeguarding the physical and psychological well-being of a minor' is '*compelling*,'" 458 U.S. at 756-757 (citation omitted) (emphasis added). Indeed, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757. Second, the "distribution of photographs and films depicting sexual activity by juveniles is *intrinsically related* to the sexual abuse of children." *Id.* at 759 (emphasis added). "[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Ibid.* Moreover, "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." *Ibid.* Third, "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is *exceedingly modest, if not de minimis.*" *Id.* at 762 (emphasis added). It would be "unlikely," the Court observed, "that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." *Id.* at 762-763.

Based principally on those three considerations, the Court concluded that live performances or photographic reproductions of children engaged in sexually explicit conduct are unprotected by the First Amendment. 458 U.S. at 764. The Court explained that, because "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, * * * it is permissible to consider these materials as without the protection of the First Amendment." *Id.* at 763-764.

2. The prohibitions at issue here restrict a category of child pornography that was not at issue in *Ferber*—depictions that are "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5). The three considerations that led the Court to hold that child pornography involving real children is unprotected, however, lead to the same conclusion here. Prohibiting the distribution of material that is virtually indistinguishable from photographs of actual children engaging in sexually explicit conduct is supported by a "compelling interest" in preventing the sexual abuse of children, 458 U.S. at 756; the dissemination of such material is "intrinsically related" to the sexual abuse of children, *id.* at 759; and the value of such material is "exceedingly modest, if not *de minimis*," *id.* at 762. Thus, as Judge Ferguson stated in his dissenting opinion below, such "child pornography should join the ranks of * * * child pornography [involving real children] as a class of speech outside the protection of the First Amendment." Pet. App. 38a.

a. Congress identified the interest underlying the prohibitions at issue here as "the protection of children from sexual exploitation." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 13). That is the same interest that supported the prohibition at issue in *Ferber*. As explained in *Ferber*, that interest is one of "surpassing importance." 458 U.S. at 757.

b. The distribution and possession of material that is virtually indistinguishable from photographs of real children engaged in sexually explicit conduct is also "intrinsically related to the sexual abuse of children." *Ferber*, 458 U.S. at 759. There are at least four ways in which the existence of such material fosters the sexual abuse of children.

First, as Congress found, "child pornography is often used as part of a method of seducing other children into sexual

activity." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 3). "[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 3).

The Senate Report elaborated on that concern:

> Child molesters and pedophiles use child pornography to convince potential victims that the depicted sexual activity is a normal practice; that other children regularly participate in sexual activities with adults or peers. Peer pressure can have a tremendous effect on children, helping to persuade a child that participating [in] sexual activity such as that depicted in the material is "all right."

S. Rep. No. 358, *supra*, at 13-14. Pedophiles and child molesters thus use child pornography "to break down the resistance and inhibitions of their victims or targets of molestation." *Id.* at 13.

As Congress found, the government's interest in preventing the seduction of children through the use of child pornography is not limited to images of actual children engaged in sexual activity. Rather, "the effect of visual depictions of child sexual activity * * * on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, * * * which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 8); accord *Fox*, 2001 WL 370045, at *4; *Mento*, 231 F.3d at 920; *Acheson*, 195 F.3d at 649; *Hilton*, 167 F.3d at 69.

Second, Congress found that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 4). "[S]uch use of child pornography," Congress determined, "can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 4). Child pornography thus "encourages the activities of child molesters and pedophiles." S. Rep. No. 358, *supra*, at 12. Again, Congress found that "the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, * * * is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means" that are "virtually indistinguishable" from images of actual children. 18 U.S.C. 2251 note (Supp. V 1999) (Finding 8); accord *Mento*, 231 F.3d at 920; *Acheson*, 195 F.3d at 649; *Hilton*, 167 F.3d at 69.

Third, because computers can alter sexually explicit depictions so as to make it "virtually impossible * * * to identify individuals, or to determine if the offending material was produced using children," 18 U.S.C. 2251 note (Supp. V 1999), Congress was concerned that the government would be unable to meet its burden of proving that a pornographic image is of a real child. S. Rep. No. 358, *supra*, at 20. In particular, because computers can produce images that are virtually indistinguishable from images of real children, a defendant charged with distributing or possessing images of real children could almost always argue that the government failed to prove beyond a reasonable doubt that the images were of real children. *Id.* at 16. That "built-in reasonable doubt argument," *ibid.*, could eventually "render[] unen-

forceable" the prohibitions against the distribution or possession of child pornography produced using actual children. *Id.* at 20. See also *Mento*, 231 F.3d at 920. Thus, as the Fifth Circuit recently explained in upholding the constitutionality of Section 2252A, "Congress has advanced a powerful new rationale for the necessity of the 'appears to be' language in § 2252A: the need to address the law enforcement problem created by tremendous advances in computer technology since *Ferber* and *Osborne* were decided, advances that have greatly exacerbated the already difficult prosecutorial burden of proving that an image is of a real child." *Fox*, 2001 WL 370045, at *5 (footnote omitted); cf. *Ferber*, 458 U.S. at 765-766 & n.19 (holding that a State may prohibit the distribution of child pornography produced outside the State in part because "[i]t is often impossible to determine where such material is produced").

Fourth, computer-generated images of children engaged in sexually explicit conduct are often exchanged for pictures of real children engaged in such conduct, and they add fuel to the underground market in child pornography. *Senate Hearing* 91 (testimony of Bruce A. Taylor). By prohibiting dissemination and possession of computer-generated images, the CPPA helps to stamp out the market for child pornography involving real children. *Hilton*, 167 F.3d at 73; see also *Fox*, 2001 WL 370045, at *4, *5; cf. *Osborne*, 495 U.S. at 110-111.

c. While the harm caused by the material at issue here is great, its value "is exceedingly modest, if not *de minimis*." *Ferber*, 458 U.S. at 762. It is "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." *Id.* at 762-763.

To the extent that it might be necessary for literary, scientific, or educational purposes to depict children engaging in such conduct, the depictions can be created in a manner that is consistent with the CPPA. Because the Act applies only to depictions that are virtually indistinguishable from photographs of real children, it does not apply to drawings, cartoons, sculptures, or paintings that depict youthful-looking persons in sexual poses. *Hilton*, 167 F.3d at 72; *Mento*, 231 F.3d at 922. The Act also affords an affirmative defense to persons who disseminate visual depictions involving adults who may appear to be children, provided that such distributers do not "advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(c)(3) (Supp. V 1999).

In addition, the Act does not apply to visual materials in which sexually explicit conduct by children is understood to be taking place, as long as the sexually explicit conduct is not itself visually depicted. Cf. *Jenkins* v. *Georgia*, 418 U.S. 153, 161 (1974). Significantly, moreover, like the state statute at issue in *Ferber*, the CPPA does not ban the dissemination of any particular message concerning the sexuality of children; it simply bans the use of child pornography in connection with that or any other message. *Ferber*, 458 U.S. at 763; cf. *Erie* v. *Pap's A.M.*, 529 U.S. 277, 293 (2000) (plurality opinion) (ban on public nudity has the effect of limiting one particular means of expressing the kind of erotic message being disseminated at nude dancing establishments). The First Amendment interest in disseminating material that is covered by the CPPA is therefore marginal at best. See *id.* at 294 (noting that "few of us would march our sons and daughters off to war to preserve the citizen's right to see specified anatomical areas exhibited at establishments like Kandyland") (internal quotation marks omitted).

d. In sum, the harms caused by depictions that are virtually indistinguishable from photographs of actual

children involved in sexually explicit conduct "overwhelmingly outweigh[] the expressive interests, if any." *Ferber*, 458 U.S. at 763-764. Thus, under the analysis set forth in *Ferber*, such child pornography is "without the protection of the First Amendment." *Id.* at 764; see also *Fox* 2001 WL 370045, at * 6 (because depictions that appear to be of actual children engaged in sexual conduct are properly considered child pornography, "they are outside the protection of the First Amendment and may be freely regulated even to the extent of an outright ban"); *Acheson*, 195 F.3d at 650 (quoting *Hilton*, 167 F.3d at 69) ("As 'it is well-settled that child pornography, an unprotected category of expression identified by its content, may be freely regulated,' * * * Appellant's facial challenge fails.").

3. Because the category of speech regulated by the prohibitions challenged by respondents is unprotected by the First Amendment, those prohibitions do not trigger strict scrutiny. The same considerations that demonstrate that the speech at issue here is unprotected, however, also show that the prohibitions are narrowly tailored to further a compelling interest. Thus, even if those prohibitions triggered strict scrutiny, they would still be constitutional.

The CPPA covers an exceedingly narrow range of depictions of children engaging in sexually explicit conduct, see 18 U.S.C. 2256(2). It substantially furthers in a number of respects the government's compelling interest in preventing the sexual exploitation and abuse of children. In addition, the statute provides for an affirmative defense that shields distributors of such images from criminal liability if the depictions they distribute are made using adult performers and the distributor does not advertise, market, or otherwise hold out the depiction to be of children. 18 U.S.C. 2252A(c) (Supp. V 1999). And there are no less restrictive means of advancing the government's compelling interest in protecting children from the harmful uses of the depictions covered

by the statute. Relying on these same basic considerations, the Fourth and Fifth Circuits have held that the CPPA satisfies strict scrutiny. *Mento*, 231 F.3d at 918-921; *Fox*, 2001 WL 370045, at *3-*6.

B. The Court Of Appeals' Reasons For Concluding That The Government Does Not Have Authority To Regulate The Depictions At Issue Are Unpersuasive

The court of appeals did not question our submission that the visual depictions at stake in this case have little, if any, value. It held, however, that the government's interests are not sufficiently compelling to justify restrictions on those depictions. See Pet. App. 15a-23a. That holding rests on three fundamental legal errors.

1. First, the court of appeals read *Ferber* to hold that Congress "has no compelling interest in regulating sexually explicit materials that do not contain visual images of actual children." Pet. App. 17a. Nothing in *Ferber*, however, prevents Congress from addressing the serious dangers to children posed by child pornography that is virtually indistinguishable from child pornography involving real children. The statute before the Court in *Ferber* applied only to depictions of sexual performances by actual children. See N.Y. Penal Law § 263.15 (McKinney 1980). Moreover, at the time of *Ferber*, the technology for producing computer-generated images that are virtually indistinguishable from photographs of real children had not yet developed. The Court in *Ferber* therefore had no occasion to decide whether the new dangers to children associated with computer technology could justify prohibitions like those at issue here. As the Fourth Circuit has explained, "*Ferber* necessarily dealt only with depictions of actual children, long before virtual pornography became an issue." *Mento*, 231 F.3d at 919.

The specific statements from *Ferber* cited by the court of appeals are not to the contrary. The court of appeals relied

on the statement in *Ferber* that the government's interest is "limited to works that *visually* depict explicit sexual conduct by children below a specified age." Pet. App. 15a-16a (quoting *Ferber*, 458 U.S. at 764 (emphasis in *Ferber*)). That sentence, however, does not draw a distinction between pictures of real children and pictures of persons who appear to be children, for both sorts of pictures "visually depict" sexual conduct by children. Indeed, in a footnote to the very statement cited by the court of appeals, the Court in *Ferber* specifically noted, without any suggestion that such laws are invalid, that two States had defined a child as "a person under age 16 or who appears as a prepubescent," and one State had defined a child as "one who is or appears to be under 16." *Ferber*, 458 U.S. at 764 n.17.

The court of appeals also relied on a statement in *Ferber* that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." Pet. App. 16a (quoting *Ferber*, 458 U.S. at 763). But that statement merely described one option available under the New York law before the Court; it was not a holding that the First Amendment protects the dissemination of images that are virtually indistinguishable from photographs of real children engaged in sexually explicit conduct. That question was not involved in the case. Moreover, as already discussed (see p. 25, *supra*), the CPPA permits persons to distribute works that use adults who appear younger as long as the depictions are not advertised, promoted, presented, described, or distributed as visual depictions of a minor engaged in sexually explicit conduct. 18 U.S.C. 2252A(c) (Supp. V 1999).

Finally, the court of appeals relied on the Court's statement in *Ferber* that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First

Amendment protection." *Ferber*, 458 U.S. at 764-765 (quoted in part at Pet. App. 17a). In context, that statement is best understood as referring to the First Amendment's protection for nonobscene written works, and perhaps nonobscene artistic drawings, paintings, cartoons, or sculptures that are created without live models—none of which are covered by the CPPA. See *Mento*, 231 F.3d at 919 n.8. Because *Ferber* presented no question concerning computer-generated or other depictions that are virtually indistinguishable from those of actual children engaged in sexual conduct, there is no reason to believe that the quoted statement was directed to such material. To the contrary, as we have pointed out above (see p. 28, *supra*), the Court elsewhere specifically noted, without any expression of disapproval, that the child pornography laws of several States applied to depictions of a person who "appears to be" a child under 16 or a prepubescent child. See 458 U.S. at 764 n.17.

More fundamentally, it would be a mistake to attempt to resolve the question presented here by parsing isolated sentences in an opinion that was addressed to the resolution of a different question. See *Texas* v. *Cobb*, No. 99-1702 (Apr. 2, 2001), slip op. 6 ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue."). The crucial part of the Court's decision in *Ferber* is the *legal analysis* the Court applied in deciding that child pornography involving real children is not protected by the First Amendment. As we have shown, under that legal analysis, the form of child pornography at issue here is likewise unprotected by the First Amendment.

2. a. The court of appeals also concluded that the First Amendment does not permit the regulation of visual depictions of child pornography based on a "consideration of the effects such images have on others, even if those effects exist." Pet. App. 16a. The provisions at issue here, however, have two independently sufficient justifications that are not

based on a consideration of the effects of the images on those who view them. Neither the interest in ensuring that the prohibitions against possession of child pornography depicting real children are not rendered unenforceable, nor the interest in preventing virtual child pornography from fueling the market for child pornography involving real children, depends on a consideration of such effects. Both interests are compelling and outweigh any marginal First Amendment interest that may be at stake in this case. In dismissing the interests supporting the CPPA as impermissibly resting on the effects that child pornography has on pedophiles who view it, the court of appeals simply ignored those distinct and vital governmental interests.

b. Congress also legitimately relied on its interest in preventing pedophiles from using child pornography to seduce children into performing sexual acts. That interest rests on Congress's judgment that child pornography is a common tool of crime. Just as States may enact bans on tools that are often used in the crime of burglary, see *People* v. *Chastain*, 733 P.2d 1206, 1208-1211 (Colo. 1987) (en banc), Congress may enact a ban on the sale of material that is often used in the crime of sexual abuse of children. It is true that the success of child pornography as a tool of crime depends on its effect on the children who view it. But that does not alter the constitutional analysis. An adult has no First Amendment right to display such material to children in the first place. In addition, the First Amendment has never been understood to "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Ferber*, 458 U.S. at 762 (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Thus, the protection of the First Amendment does not extend to visual depictions of child pornography that are commonly used as an integral part of the crime of sexual abuse of children. Children do not have the maturity in

judgment to evaluate the material that is presented to them by pedophiles, and pedophiles exploit that vulnerability to commit their crimes.

This Court's decision in *Osborne* v. *Ohio*, 495 U.S. 103 (1990), fully supports the conclusion that the government may prohibit the possession of child pornography in order to prevent pedophiles from using it to seduce children into sexual activity. In that case, the Court upheld Ohio's ban on the possession of child pornography, relying in part on the State's interest in preventing pedophiles from using child pornography "to seduce other children into sexual activity." 495 U.S. at 111. As the First Circuit explained in *Hilton*, 167 F.3d at 70, *Osborne* "marks a subtle, yet crucial, extension of a state's legitimate interest to the protection of children not actually depicted in prohibited images."

c. Congress also legitimately considered the fact that pedophiles use child pornography to whet their appetites for sexual abuse. The government's interest in preventing pedophiles from using child pornography to stimulate their appetites for sexual abuse does depend on the effects such images have on pedophiles, and the regulation of speech because of its potential to incite unlawful conduct ordinarily does raise serious First Amendment concerns. See *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam). In the circumstances presented here, however, the First Amendment does not preclude Congress from taking account of the effects that child pornography has on pedophiles, along with the other considerations discussed above, in responding to the compelling interest in protecting children against sexual abuse.

First, children are especially vulnerable victims who are unlikely to be able to resist abuse or to have the maturity of judgment to seek assistance in avoiding their abusers. Second, the crime of sexual abuse is secretive in nature and is unlikely to be observed by those who could protect

children targeted by pedophiles. Third, it would not be practical for Congress to rely exclusively on counter-speech to address that problem. See *Kansas* v. *Hendricks*, 521 U.S. 346, 360 (1997). Fourth, the government has "greater leeway" to regulate pornographic depictions of children than it has to regulate other kinds of materials. *Ferber*, 458 U.S. at 756. And fifth, in contrast to the core First Amendment interest in political speech at issue in *Brandenburg*, the First Amendment interest in disseminating child pornography is modest, if not *de minimis*. *Ferber*, 458 U.S. at 762-763. Those factors combine to justify as both legitimate and compelling the government's interest in preventing pedophiles from using child pornography to whet their appetites for sexual abuse. In any event, the constitutionality of the "appears to be" and "conveys the impression" prohibitions does not ultimately depend on the acceptance of the "whetting the appetite" rationale. As we have discussed, there are three other independent justifications for the prohibitions, and those justifications taken together are more than sufficient to sustain their constitutionality.

3. Finally, the court of appeals rejected Congress's findings that the dissemination of child pornography fosters the sexual abuse of children, concluding that there is not a demonstrated link between child pornography and the "subsequent sexual abuse of children." Pet. App. 20a. The court apparently based that conclusion on a single student law review note. *Ibid.* (citing Ronald Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 483, 488, 490 (1996)). The court erred in casting aside Congress's considered judgment in that fashion.

In reviewing the validity of a federal statute under the First Amendment, "courts must accord substantial deference to the predictive judgments of Congress." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997). The courts' "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence,'" and "substantiality" is measured "by a standard more deferential" than that accorded "to judgments of an administrative agency." *Id.* at 195. Such deference is warranted both because Congress is "far better equipped than the judiciary" to gather and evaluate evidence bearing upon legislative questions, *ibid.*, and out of "respect for [Congress's] authority to exercise the legislative power," *id.* at 196. Moreover, in reviewing Congress's actions, a court may not insist that Congress make its determinations on the basis of particular forms of evidence. In addition to relying on the testimony of experts and others with relevant experience, Congress may also rely on the judgments of other public bodies that have investigated the problem, *Pap's*, 529 U.S. at 297; *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986), judicial opinions, *Pap's*, 529 U.S. at 297, and "common sense," *Burson* v. *Freeman*, 504 U.S. 191, 207, 211 (1992) (plurality opinion). When Congress's findings on the relationship between child pornography and sexual abuse are reviewed with the appropriate degree of deference, they must be credited.

a. A wealth of evidence supports Congress's finding that pedophiles use child pornography to seduce children into sexual activity. Researchers and prosecutors who testified at the Senate Hearing informed Congress unequivocally that pedophiles use child pornography as a method of seduction.[4]

[4] *Senate Hearing* 35 (statement of professor of psychology Dr. Victor Cline) (Child pornography is used "to seduce children into engaging in sexual acts" with adults.); *id.* at 96-97 (testimony of Bruce A. Taylor, President and Chief Counsel of the National Law Center for Children and Families) ("Actual or simulated child pornography is shown to convince the child that other children regularly participate in sexual activities with

Earlier federal investigations arrived at the same conclusion. In 1986, the Attorney General's Commission on Pornography found "substantial evidence that photographs of children engaged in sexual activity are used as tools for further molestation of other children." *Final Report*, *supra*, at 411.[5] In

adults or peers. * * * Continued exposure to the pornography lowers the inhibitions of the child to a point where he allows the molester to kiss and touch him sexually. Eventually, if successful, the seduction process progresses to more explicit activity between the child victim and adult or other children, using the pornography as instructional tools.") (footnote omitted); *id.* at 20 (statement of Deputy Chief Postal Inspector Jeffrey J. Dupilka) ("Child molesters use kiddie porn to seduce children into participating in sexual activity with them."); *id.* at 18 (statement of Deputy Assistant Attorney General Kevin U. DiGregory) ("Entirely artificial images * * * can be used by pedophiles to seduce children"); *id.* at 37 (testimony of Dee Jepsen, President of Enough is Enough) ("Therapists who treat sexually addicted persons declare, and studies confirm, that pornography, often child pornography, does play a major role in the molestation process with children.").

[5] See *Final Report*, *supra*, at 411 ("Children are shown pictures of other children engaged in sexual activity, with the aim of persuading especially a quite young child that if it is in a picture, and if other children are doing it, then it must be all right for this child to do it."); *id.* at 649 ("Child pornography is often used as part of a method of seducing child victims."); *ibid.* ("A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity."); *ibid.* ("From a very early age children are taught to respect and believe material contained in books and will thus have the same beliefs about child pornography."); *id.* at 649-650 ("Child pornography is * * * used to illustrate the activities in which the pedophile wishes a child to engage. In such instances a pedophile offender shows the child the pornography and asks the child to imitate the pictures.") (footnote omitted); *id.* at 649 ("A pedophile offender will use child pornography in which the children appear to be having a good time. The offender uses this material to lower the inhibitions of the child and entice him or her into a desired activity. Children who view this material are also subject to a certain amount of peer pressure as they see other children engaged in the activity.").

that same year, the Senate Permanent Subcommittee on Investigations also concluded that pedophiles use child pornography to "lower a child's inhibitions," and to "assist them in seducing their victims." S. Rep. No. 537, 99th Cong., 2d Sess. 10, 44 (1986). This Court specifically noted in *Osborne* that "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity," 495 U.S. at 111, and the available secondary literature confirms that conclusion.[6] The reported cases also provide vivid examples of pedophiles using images of child pornography in the course of exploiting children sexually.[7]

Child pornography is not the only means by which pedophiles seduce children into sexual activity. The evidence before Congress, however, shows that it plays a significant role. One witness informed Congress that approximately one-third of the molesters in his practice had used child pornography as a seduction tool. *Senate Hearing* 116 (testimony of Dr. Cline). Another witness testified that a study of 1,400 sexual exploitation cases in Louisville, Kentucky

[6] Tim Tate, *Child Pornography: An Investigation* 118 (1990) (a pedophile's collection of child pornography is "a vital tool in the future seduction of new victims"); Daniel Campagna & Donald Poffenberger, *The Sexual Trafficking in Children: An Investigation of the Child Sex Trade* 118 (1988) (child pornography is used "to lower a minor's inhibitions and resistance to sex," and "as an instructional aid to indoctrinate victims into various sexual practices"); Shirley O'Brien, *Child Pornography* 89 (1983) (child pornography is "used to convince [the] child that other children are sexually active," and as a tool to "lower[] [the] child's inhibitions" against sexual activity with adults); Seth Goldstein, *The Sexual Exploitation of Children: A Practical Guide To Assessment, Investigation, and Intervention* 149 (2d ed. 1999) (child pornography "is often used by the child molester to seduce the child").

[7] See, *e.g.*, *United States* v. *Snyder*, 189 F.3d 640, 643 (7th Cir. 1999), cert. denied, 527 U.S. 1097 (2000); *Burke* v. *State*, 27 S.W.3d 651, 655 (Tex. Ct. App. 2000), petition for discretionary review refused, Nos. 00-1869 & 00-1870 (Tex. Crim. App. Dec. 6, 2000).

"revealed that a significant number of molestation cases involve child pornography." *Id.* at 92. The testimony that Congress heard is consistent with evidence from other sources. The Senate Permanent Subcommittee on Investigations reported that most of the child molesters that it interviewed "said they had used [such] material to lower the inhibitions of children or to coach them into posing for photographs." S. Rep. No. 537, *supra*, at 9. And a study conducted by the Los Angeles Police Department's Sexually Exploited Child Unit revealed that more than 20% of the 320 cases investigated by that unit during a ten-year period involved the use of child pornography. *The Sexual Exploitation of Children*, *supra*, at 149.

The evidence before Congress also established that computer-generated pictures of child pornography can be used to seduce children just as effectively as pictures of real children. One witness explained that there is "no difference" between computer-generated pornography and pictures of actual children in terms of their effectiveness as a tool of seduction of minors. *Senate Hearing* 116 (testimony of Dr. Victor Cline). Another witness similarly testified that "[t]he real and the apparent * * * are equally dangerous because both have * * * the same seductive effect on a child victim." *Id.* at 70 (testimony of Bruce A. Taylor). Since computer technology can be used to produce visual depictions that are virtually indistinguishable from unretouched photos of actual children engaged in sexually explicit conduct, it would be difficult to reach any other conclusion.

Indeed, even the student note relied upon by the court of appeals found it "relatively easy to infer from proof that children are swayed by images of actual children the conclusion that they will also be swayed by lifelike computer-generated images." Adelman, *supra*, 14 J. Marshall J. Computer & Info. L. at 490. The note further stated that "computer-generated images may be even more dangerous

than photographic ones," since "[i]t will soon be possible to create realistic sexually explicit images of a child's friends or siblings in an effort to convince that child that engaging in sexual acts is acceptable." *Id.* at 490-491.

b. In addition, Congress had a substantial basis for concluding that a prohibition against images that appear to be of children engaged in sexual activity is necessary in order to make sure that those who distribute and possess images depicting real children engaged in sexual activity do not escape prosecution and conviction. Congress was informed that in one major federal child pornography prosecution—*United States* v. *Kimbrough*, 69 F.3d 723, 733 (5th Cir. 1995), cert. denied, 517 U.S. 1157 (1996)—the defendant had relied on the existence of "currently available computer programs" to argue "that the Government had the burden of proving that each item of alleged child pornography did, in fact, depict an actual minor rather than an adult made to look like one, and that the defendant should be acquitted if the government did not meet that burden." S. Rep. No. 358, *supra*, at 17 (quoting *Senate Hearing* 18 (statement of Deputy Assistant Attorney General DiGregory)).

The government overcame the defense in the *Kimbrough* case "through a carefully executed cross-examination and production, in court, of some of the original magazines from which the computer-generated images were scanned." *Senate Hearing* 18. When *Kimbrough* was tried, however, the relevant technology was "at an early stage of development." *Ibid.* Congress also learned that, as time passes, "magazine archives will be of less value to prosecutors since child pornography produced today will no longer predate the availability of graphic imaging software." *Ibid.*[8]

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[8] Since the enactment of the CPPA, defendants have continued to argue that the pictures they are accused of possessing are not of real children. See, *e.g.*, *Fox*, 2001 WL 370045, at *5 ("During the trial in the

c. There was also substantial testimony presented to Congress that pedophiles exchange pictures of children engaged in sexual activities. *Senate Hearing* 35 (testimony of Dr. Cline); *id.* at 30 (testimony of Deputy Chief Postal Inspector Dupilka); *id.* at 90 (testimony of Bruce Taylor). Evidence from other sources confirms that child pornography is a form of currency that can be used to obtain additional child pornography. See Kenneth Lanning, *Collectors, in Child Pornography and Sex Rings* 83, 86-87 (Ann Burgess et al. eds. 1984) ("child pornography and erotica" is used "as a medium of exchange," with pedophiles "exchang[ing] photographs of children for access to or phone numbers of other children"). Accord S. Rep. No. 537, *supra*, at 11; see also *Final Report*, *supra*, at 650 ("Child pornography is also seen as a valuable commodity among pedophiles," and "[v]isual depictions may be traded or sold between collectors."). Indeed, in 1984, Congress deleted the commercial purpose requirement from the federal child pornography laws precisely because "[m]any of the individuals who distribute" child pornography "do so by gift or exchange without any commercial motive." H.R. Rep. No. 536, 98th Cong., 1st Sess. 2 (1983). Substantial evidence therefore supports Congress's judgment that prohibiting the

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instant case, for example, Special Agent Barkhausen, the government's computer expert, was forced to concede under cross-examination that 'there's no way of actually knowing that the individual depicted [in the images] . . . even exists[.]'"); *United States* v. *Coleman*, No. ARMY 9801240, 2001 WL 55523, at *3 (Army Ct. Crim. App. Jan. 24, 2001) (upholding guilty plea despite defendant's contention that "he failed to explicitly admit that the children in the images were 'real,' as opposed to computer-generated, images"); *United States* v. *Vig*, 167 F.3d 443, 450 (8th Cir.) (rejecting defendant's argument that images might not be of real children as "unsupported speculation"), cert. denied, 528 U.S. 859 (1999). See also Br. for Appellant at 34-35 in *United States* v. *Marvin Hersh*, No. 00-14592-CC (11th Cir. Feb. 27, 2001).

dissemination and possession of images that appear to be of children engaged in sexual activity will help to stamp out the market for child pornography involving real children.

d. Finally, the evidence before Congress established that "[c]hild pornography stimulates the sexual appetites and encourages the activities of child molesters and pedophiles." S. Rep. No. 358, *supra*, at 12. One psychiatrist informed Congress that "the overwhelming majority" of pedophiles in his clinical experience "use child pornography and/or create it to stimulate and whet their sexual appetites which they masturbate to, then later use as a model for their own sexual acting-out with children." *Senate Hearing* 35 (testimony of Dr. Cline). Congress also learned that in "many cases coming to the attention of law enforcement the arousal and fantasy fueled by child pornography is only a prelude to actual sexual activity with children." S. Rep. No. 358, *supra*, at 13.

Independent investigators have come to the same conclusion. For example, one commentator has explained:

> Child pornography and child erotica is used for the sexual arousal and gratification of pedophiles. They use child pornography the same way other people use adult pornography—to feed sexual fantasies. Some pedophiles only collect and fantasize about the material without enacting these fantasies. In most cases coming to the attention of law enforcement, however, the arousal and fantasy fueled by the pornography is only a prelude to actual sexual activity with children.

Lanning, *supra*, 86; accord S. Rep. No. 537, *supra*, at 10. Once again, Congress was informed that even if "no underage children were used in producing this pornographic material, to the viewer this is irrelevant because they are perceived as minors to the psyche." *Senate Hearing* 35-36 (testimony of Victor Cline).

4. In sum, the court of appeals erred as a matter of law in concluding that the interests supporting the provisions at issue are not compelling. Because those interests clearly outweigh whatever minimal First Amendment interest may be at stake in disseminating depictions that are virtually indistinguishable from photographs of real children engaged in sexually explicit conduct, the provisions at issue here do not violate the First Amendment.

C. The Provisions At Issue Are Not Unconstitutionally Vague

The CPPA's "appears to be" and "conveys the impression" provisions are also not unconstitutionally vague. Pet. App. 24a. The Constitution does not impose "'impossible standards' of clarity." *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983). Nor does it require "mathematical certainty" from statutory language. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). The First Amendment and the Due Process Clause require only that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108.

The CPPA's "appears to be" and "conveys the impression" provisions satisfy that standard. As we have explained, both provisions apply only to material that is "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." See, *e.g.*, 18 U.S.C. 2251 note (Supp. V 1999) (Findings 5, 8, 13). Persons of ordinary intelligence can discern whether material falls within that standard.

The court of appeals concluded that the statutory standard is "highly subjective" and therefore impermissibly vague. Pet. App. 24a. The standard imposed by the CPPA, however, is an "objective" standard, not a subjective one. As the First Circuit explained in *Hilton*, "[a] jury must decide, based on the totality of the circumstances, whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity." 167 F.3d at 75; accord *Mento*, 231 F.3d at 922.

As the First Circuit further explained, "any number of objective signs" can "warn an ordinary viewer of sexually explicit material of the apparent age of the person depicted." *Hilton*, 167 F.3d at 76. The physical characteristics of the person depicted will provide adequate warning in a great range of cases, including those in which an apparent prepubescent child is depicted. *Id.* at 73-74; accord *Fox*, 2001 WL 370045, at *8. When the physical characteristics of the person depicted leave room for doubt, fair warning can be obtained from "the manner in which the image was described, displayed, or advertised." *Hilton*, 167 F.3d at 75; accord *Acheson*, 195 F.3d at 652-653. Moreover, "those involved in the production of lawful sexually explicit material can easily protect themselves by verifying the ages of the models they employ or by taking steps to visually demonstrate that a computer-generated image is meant to portray an adult." *Hilton*, 167 F.3d at 76. See 18 U.S.C. 2257 (requiring producers of sexually explicit visual depictions to create and maintain records of the names and ages of their performers).

The Act's scienter requirement—that any violation must be "knowing[]"—further diminishes any vagueness concerns. See 18 U.S.C. 2252A(a)(1)-(5) (Supp. V 1999). A person who honestly believes that a reasonable unsuspecting viewer would not consider the depiction to be of a minor must be acquitted. See *Hilton*, 167 F.3d at 75-76; *Fox*, 2001 WL 370045, at *8; see also *United States* v. *X-Citement Video*, 513 U.S. 64 (1994).

This Court's decision in *Ferber* confirms that use of the terms "appears to be" and "conveys the impression" do not render the CPPA unconstitutionally vague. In that case, the Court held that New York's child pornography law defined

the forbidden acts of sexually conduct "with sufficient precision." 458 U.S. at 765. That law included as one forbidden act "simulated sexual intercourse," *ibid.*, and the meaning of "simulate" is "to give the appearance" of, *Webster's Third New International Dictionary* 2122 (1976). See also *Miller*, 413 U.S. at 24, 27 (holding that inquiries into whether material "appeal[s] to the prurient interest" of the "average person, applying contemporary community standards," and depicts in a "patently offensive" way sexual conduct defined by state law, are not unconstitutionally vague); 18 U.S.C. 1028(a)(6) (1994 & Supp. V 1999) (making it unlawful to "knowingly possess[] an identification document that is or appears to be an identification document of the United States which is stolen or produced without lawful authority knowing that such document was stolen or produced without such authority"). The court of appeals therefore erred in holding that the provisions at issue are unconstitutionally vague.

D. The Provisions At Issue Are Not Substantially Overbroad

The court of appeals held that the provisions at issue are substantially overbroad. It based that holding, however, entirely on its earlier conclusion that a compelling interest in regulating child pornography is implicated only when the material at issue depicts real children. Pet. App. 25a-27a. As we have explained, that part of the court's analysis is simply incorrect. The compelling interest in protecting children from sexual abuse is also fully implicated when the material is virtually indistinguishable from depictions of real children engaged in sexually explicit conduct, and that interest clearly outweighs the First Amendment interest, if any, in disseminating and possessing such material.

Moreover, applying ordinary overbreadth standards, the CPPA is not unconstitutionally overbroad. This Court has

held that the overbreadth doctrine is "strong medicine" and, that in order for the doctrine to be applied, the overbreadth involved "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613, 615 (1973). Judged by that standard, the provisions at issue are not unconstitutionally overbroad.

In *Ferber*, the Court rejected an overbreadth challenge to New York's prohibition against the distribution of depictions of real children involved in sexually explicit conduct. 458 U.S. at 773-774. The Court "consider[ed] this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." *Id.* at 773. The Court emphasized that the statute was aimed "at the hard core of child pornography," and it did not view the possibility that some protected expression might be covered by the statute as sufficient to require facial invalidation. *Ibid.* The Court explained that "[h]ow often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of § 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Ibid.* In those circumstances, the Court concluded, "§ 263.15 is 'not substantially overbroad and . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" *Id.* at 773-774 (quoting *Broadrick*, 413 U.S. at 615-616).

The reasoning applied in *Ferber* is equally applicable here. Like the statute at issue in *Ferber*, the CPPA is aimed at "hard core" child pornography—depictions that involve "sexual intercourse," or "lascivious exhibition of the genitals or pubic area." 18 U.S.C. 2256(2)(A) and (E). The CPPA

does not apply to an "innocuous depiction of a minor * * * however that depiction is produced." S. Rep. No. 358, *supra*, at 20. For example, the "Coppertone suntan lotion advertisements featuring a young girl in a bathing suit are not now, and will not become under [the statute], child pornography." *Ibid.* Nor is the statute implicated by a "parental picture of a child in the bathtub or lying on a bearskin rug." *Id.* at 21.

As in *Ferber*, it is difficult to know precisely how often it might be necessary to use depictions that are covered by the CPPA in order to produce educational, medical, or artistic works. But here, as in *Ferber*, there has been no suggestion that materials of that kind would amount to more than a tiny fraction of the materials within the statute's reach. As we have discussed, there are several ways to disseminate educational, medical, or artistic works concerning a child's sexuality without violating the CPPA: The Act does not cover drawings, cartoons, sculptures, and paintings that depict youthful-looking persons in sexual poses; it supplies an affirmative defense to persons who disseminate visual depictions involving adults who may appear to be children, provided that the depictions are not promoted or presented as child pornography, 18 U.S.C. 2252A(c) (Supp. V 1999); and the Act does not apply to visual materials in which sexually explicit conduct by children is understood to be taking place, as long as the sexually explicit conduct is not itself visually depicted. Thus, here, as in *Ferber*, the provisions at issue are "not substantially overbroad and . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Ferber*, 458 U.S. at 773-774 (quoting *Broadrick*, 413 U.S. at 615-616); see *Fox*, 2001 WL

370045, at *7; *Acheson*, 195 F.3d at 652; *Hilton*, 167 F.3d at 74.[9]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[9] We do not suggest that the Act has any invalid application or that the First Amendment requires some type of serious value defense. Regardless of its value, material that is covered by the CPPA can still be used to seduce children into sexual activity; it can still be used by pedophiles to stimulate their appetites for sexual abuse; it can still frustrate prosecutions involving depictions of real children who cannot be identified as such; and it can still be exchanged for other pictures of child pornography. Cf. *Ferber*, 458 U.S. at 774-775 (O'Connor, J., concurring). Those considerations are paramount, and they categorically outweigh the First Amendment interests at stake in disseminating child pornography. As the Court did in *Ferber*, however, we recognize that the Act raises more serious questions as applied to the limited number of cases, if any, in which depictions of child pornography are necessary "in order to produce educational, medical, or artistic works." *Ferber*, 458 U.S. at 773.

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IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

THE FREE SPEECH COALITION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The Ninth Circuit Court of Appeals found two provisions of the Child Pornography Prevention Act of 1996 unconstitutional because they impose an unjustifiable restriction on free speech and are unduly vague and overbroad. The first provision bans sexually explicit visual depictions of persons who are not minors but who "appear to be" minors. The second provision prohibits sexually explicit material that is advertised in a way that "conveys the impression" that minors are depicted even though, in reality, they are not. The question presented in this case is whether, under the First Amendment, sexually explicit, non-obscene material containing no children can be banned by Congress as "child pornography" simply because the material is perceived by someone as depicting a person who "appears to be" a minor or because the material is promoted in a manner that someone believes "conveys the impression" that minors are depicted.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	vi
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
A. Child Pornography Laws And The First Amendment	1
B. The Child Pornography Prevention Act Of 1996	4
C. Warnings To Congress Regarding The Unconstitutionality Of The CPPA	6
D. The Free Speech Coalition Challenges The CPPA	8
Summary of Argument	12
Argument	17
A. The Scope Of The CPPA Is Considerably Broader Than Petitioners Suggest And The Scope Of Respondents' Challenge To The Act Is Much Narrower.	17
1. The CPPA Bans Far More Expression Than "Virtually Indistinguishable" Forms Of Child Pornography.	17

Contents

	Page
2. Scope Of The Challenge To This Court	20
B. The Broad Range Of Materials Banned By The CPPA's "Appears To Be" And "Conveys The Impression" Provisions Are Protected By The First Amendment And Any Restrictions On Those Materials Must Be Subjected To Strict Scrutiny Analysis.	21
1. *Ferber* Expressly Retains First Amendment Protections For Materials Banned By The CPPA.	22
2. The "Principal Considerations" Of *Ferber* Do Not Lead To The Conclusion That The Types Of Materials Banned By The CPPA Are Unprotected By The First Amendment.	23
C. The "Appears To Be" And "Conveys The Impression" Provisions Are Not Narrowly Tailored To Serve A Compelling Governmental Interest.	27
1. The Government's Interest In Regulating Child Pornography Is Properly Limited To Sexually Explicit Materials Depicting Actual Children.	27
2. The CPPA's "Appears To Be" And "Conveys The Impression" Provisions Are Not Narrowly Tailored To Serve The Government's Interest In Regulating Sexually Explicit Material Depicting Actual Children.	29

Contents

Page

3. The Legislative Findings Do Not Support A Compelling Governmental Interest In Regulating Sexual Expression Involving No Actual Children And The "Appears To Be" And "Conveys The Impression" Provisions Are Not Narrowly Tailored To Meet The Purported Findings. 31

(a) Pedophiles' Purported Use Of Child Pornography To Whet Their Sexual Appetites And To Seduce Children. 32

(b) Pedophiles' Purported Trading Of "Virtual" Child Pornography In The Child Pornography Market ... 34

(c) Pedophiles' Purported Use Of Materials Depicting No Actual Children To Escape Conviction. .. 36

D. The CPPA's "Appears To Be" And "Conveys The Impression" Provisions Are Unconstitutionally Overbroad. 39

1. The "Appears To Be" And "Conveys The Impression" Provisions Ban Vast Amounts Of Constitutionally-Protected Speech. 39

2. The Affirmative Defense Does Not Remedy The Inherent Overbreadth Problems Of The "Appears To Be" And "Conveys The Impression" Provisions. 41

Contents

Page

E. The "Appears To Be" And "Conveys The Impression" Provisions Of The CPPA Are Unconstitutionally Vague. 45

Conclusion 50

TABLE OF CITED AUTHORITIES

Cases: *Page*

American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) 7

American Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992) 1

American Library Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995) ... 46, 49

Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983) 1, 33, 34

Boos v. Barry, 485 U.S. 312 (1988) 13, 27

Brandenburg v. Ohio, 395 U.S. 444 (1969) 33

Butler v. Michigan, 352 U.S. 380 (1957) 1, 3, 28, 34

Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) 28, 33

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 28

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 44

Grayned v. City of Rockford, 408 U.S. 104 (1972) 45, 49

Jacobson v. United States, 503 U.S. 540 (1992) ... 38

Cited Authorities

Page

Kois v. Wisconsin, 408 U.S. 229 (1972) 28

Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 19

New York v. Ferber, 458 U.S. 747 (1982) ..... *passim*

Patterson v. New York, 432 U.S. 197 (1977) 42

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) ... 13, 33

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) 7, 28, 29, 33, 34, 38, 39, 40, 47

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) .. 36

Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989) 15, 27, 28, 34

Sandstrom v. Montana, 442 U.S. 510 (1979) 42

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 28

Stanley v. Georgia, 394 U.S. 557 (1969) 33

Thornhill v. Alabama, 310 U.S. 88 (1940) 39

United States v. Acheson, 195 F.3d 645 (11th Cir. 1999) 17

United States v. Coleman, 54 M.J. 869 (Army Ct. Crim. App. 2001) 37

Cited Authorities

Page

United States v. Fox, 248 F.3d 394 (5th Cir. 2001) 17, 30, 37

United States v. Hilton, 167 F.3d 61 (1st Cir.), *cert. denied*, 528 U.S. 844 (1999) 17

United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996) 37

United States v. Knox, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) 46

United States v. Marvin Hersh, No. 00-14592-CC (11th Cir. 2001) 37

United States v. Mento, 231 F.3d 912 (4th Cir. 2000), *petition for cert. filed*, No. 00-8114 ..... 17, 19

United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) 21

United States v. Vig, 167 F.3d 443 (8th Cir.), *cert. denied*, 528 U.S. 859 (1999) 37

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 38, 42

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 45

United States Constitution:

First Amendment ..... *passim*

Fifth Amendment 1, 9, 16, 38, 45

Cited Authorities

Page

Statutes:

18 U.S.C. § 2251 ..... 4, 17, 19, 48

18 U.S.C. §§ 2251-2253 ..... 2, 3

18 U.S.C. §§ 2251A-2252 4

18 U.S.C. § 2252 ..... 4, 38

18 U.S.C. § 2252(a)(4) 4

18 U.S.C. § 2252A 4

18 U.S.C. § 2252A(a)(1) 36

18 U.S.C. § 2252A(a)(4) 36

18 U.S.C. § 2252A(b)(1) 6, 30

18 U.S.C. § 2252A(c) 41, 42

18 U.S.C. § 2252A(c)(1) 42, 43

18 U.S.C. § 2252A(c)(3) 44

18 U.S.C. § 2252A(d) 42, 44

18 U.S.C. § 2256 4

18 U.S.C. § 2256(1) 2

18 U.S.C. §§ 2256(2)(A)-(E) 6

	Page
18 U.S.C. § 2256(5)	18
18 U.S.C. § 2256(8)	5, 18, 40
18 U.S.C. § 2256(8)(A)	5, 9, 18, 20, 22
18 U.S.C. § 2256(8)(B)	5, 18, 20, 21, 29, 42, 45
18 U.S.C. § 2256(8)(C)	5, 8, 9, 18, 20, 33
18 U.S.C. § 2256(8)(D)	5, 18, 20, 21, 22, 29, 30, 42, 44, 45
18 U.S.C. § 2257	4, 43
18 U.S.C. § 2259	4
Pub. L. No. 95-225, 92 Stat. 7 (1977)	1, 2
Pub. L. No. 98-292, 98 Stat. 204 (1984)	2
Pub. L. No. 99-628, § 2, 100 Stat. 3510 (1986)	4
Pub. L. No. 100-690, 102 Stat. 4181 (1988)	4
Pub. L. No. 101-647, § 301, 104 Stat. 4789 (1990)	4
Pub. L. No. 103-322, § 16001, 108 Stat. 2036 (1994)	4
Pub. L. No. 104-208, Div. A, Tit. I, § 121, 110 Stat. 3009-26	5, 8

	Page
Other Authorities:	
Ronald Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 491 (1996)	3
Attorney General's Comm'n on Pornography, Final Report 405 (1986)	3, 5, 14, 27, 28, 30
Joan Biskupic, *High Court Takes on 'Virtual' Child Porn*, USA Today, Jan. 23, 2001	17
133 Cong. Rec. S14203 (daily ed., Oct. 14, 1987)	46
K.J. Dover, *Greek Homosexuality* (1978)	30
Kenneth Lanning's *Collectors in Child Pornography and Sex Rings* (Ann Burgess et al. eds., 1984)	35
Michael D. Lemonick, "Teens Before Their Time," *Time*, Oct. 30, 2000	46
S. Rep. No. 358, 104th Cong. 2d Sess. (1996)	2, 5, 6, 7, 8, 19, 20, 32, 37
Reay Tannahill, *Sex in History* 67 (1992)	30
Stuart Taylor Jr., *Is it Sexual Exploitation if the Victims are 'Virtual'?*, Newsweek, Mar. 19, 2001	17
Bob Van Voris, "Coming Soon ... 'Lolita,' The Lawyer's Cut," *The National Law Journal*, Aug. 17, 1998	6, 10, 29

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." The Due Process Clause of the Fifth Amendment to the United States Constitution states that "No person shall . . . be deprived of life, liberty, or property, without due process of law." The relevant provisions of the Child Pornography Prevention Act of 1996 are reproduced in an appendix to the petition for writ of certiorari. *See* Pet. App. 67a-76a.

STATEMENT OF THE CASE

A. Child Pornography Laws And The First Amendment

Over the years, Congress has enacted several laws designed to combat the real evils of child pornography by prohibiting the possession, production, and distribution of materials depicting children in a sexually explicit manner.[1] During this time, it has been understood that, in fighting the dangers of child pornography, legislation cannot "reduce the adult population . . . to reading [and viewing] only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Accordingly, Congress has been advised that, regardless of the Government's interest in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 74-75 (1983).

With this understanding, legislative efforts to prohibit child pornography, and corresponding reviews of such efforts by the judiciary, have centered on the harm of child pornography to the children used in its production, and not on the effect such material has on the adult viewer. *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225,

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[1] *See American Library Ass'n v. Barr*, 956 F.2d 1178, 1181-85 (D.C. Cir. 1992) (providing a history of federal child pornography legislation).

92 Stat. 7 (1977) (prohibiting the use of a minor in the production of sexually explicit depictions). Indeed, prior to 1996, the common purpose and effect of all child pornography legislation was to ensure that children were not used or otherwise exploited as the subjects of, or participants in, sexually explicit materials.[2] *See* S. Rep. No. 358, at 29 (1996).

In 1982, this Court established the constitutional framework for preserving the rights of adults while fighting the real harm of child pornography. In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that sexually explicit material depicting actual children is unprotected by the First Amendment regardless of whether it is obscene, but that non-obscene simulations of child pornography that do not involve real children in making the images "retain[] First Amendment protection." *Id.* at 765. This ruling was based on documented evidence that minors can suffer serious harm by participating as *performers* in sexually explicit materials. *See id.* at 758-59. This Court therefore has made clear that Congress can ban child pornography only to the extent that the proscribed material portrays sexually explicit conduct by actual children. *See id.* at 764. The Court specifically authorized the use of young-looking adults in non-obscene, sexually explicit performances so that the literary, artistic, and scientific value of sexual depictions can be preserved under the First Amendment. *Id.* at 765.

Given the constitutional framework of *Ferber*, Congress passed the Child Protection Act of 1984, which prohibited the distribution, possession, or sale of material depicting actual children engaged in sexual activity, regardless of whether the material is obscene. *See* Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2253). This Act, combined with preexisting legislation passed in 1977 prohibiting the use of minors in sexually explicit productions,

[2] "Child" and "minor" are used synonymously in this brief. A minor is defined as "any person under the age of eighteen years." 18 U.S.C. § 2256(1) (Supp V 1999).

see 18 U.S.C. §§ 2251-2253, targeted materials depicting actual children and the individuals who actually abuse them. In so doing, Congress established a highly effective network for fighting the real evils of child pornography and real acts of sexual abuse, while preserving the constitutional freedoms of law-abiding adults under the First Amendment.

The viability and prudence of this constitutional balance were reinforced in 1986 when the Attorney General's Commission on Pornography released its Final Report on child pornography. *See* Attorney General's Comm'n on Pornography, Final Report 405-418, 595-735 (1986) [hereinafter Final Report or Report]. The Report examined the effect of sexually explicit, "fictional" depictions of children and concluded that these depictions should not be considered "child pornography." Final Report, 596. Consistent with *Ferber*, the Report cautioned that the term "child pornography" is "only appropriate as a description of material depicting *real* children." *Id.* at 597 (footnote omitted). By way of example, the Report concluded that a sexually explicit film adaptation of Vladimir Nabokov's novel, *Lolita*, using an adult actress to play the part of a young girl, "could never be 'child pornography'" because it does not depict an actual child engaged in sexual conduct. *Id.* at 598. The Report also found that, although there is a "significant use" of "adult sexually explicit material" to lure children into sexual activity, there was insufficient evidence of such activity to justify further limitations on adult materials. Thus, the Report concluded that legislators should not pass child pornography legislation designed to "'burn the house to roast the pig.'" *Id.* at 411 n.74 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); *see also* Ronald Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 491 (1996) (interpreting the Final Report to suggest that the use of child pornography to lure children "played a relatively small part in the Commission's view of the overall problem").

Following the Final Report, Congress passed the Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251), which banned the use and production of advertisements for child pornography. Two years later, Congress enacted the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. §§ 2251A-2252), which banned the use of computers to transport, receive, or distribute child pornography and required producers of sexually explicit materials to maintain records of performers' names and birth dates. *See* 18 U.S.C. § 2257. Congress followed this legislation with the Child Protection Restoration and Penalties Enhancement Act of 1990, which prohibited the possession of three or more pieces of child pornography. *See* Pub. L. No. 101-647, § 301, 104 Stat. 4789 (1990) (codified as amended at 18 U.S.C. § 2252(a)(4)). In 1994, Congress amended its laws by punishing the production or importation of sexually explicit depictions of minors. *See* Pub. L. No. 103-322, § 16001, 108 Stat. 2036 (1994) (codified as amended at 18 U.S.C. § 2259). As with prior legislation, all of these laws were designed to preclude actual minors from being depicted in a sexually explicit manner, while still preserving the right of adults to read and view non-obscene, constitutionally-protected materials.

B. The Child Pornography Prevention Act Of 1996

This constitutional balance, however, was disrupted on September 30, 1996, with the passage of the Child Pornography Prevention Act of 1996 ("CPPA" or "Act"). This Act radically expands the definition of "child pornography" by including within that definition sexually explicit depictions of nonchildren, including youthful-looking adults and fictional characters.[3]

[3] The CPPA amended Title 18, Chapter 110 of the United States Code by revising §§ 2251, 2252, 2256 and adding a new § 2252A. Section 2252A, entitled "Certain activities relating to material constituting or containing chi pornography," prohibits persons from, (Cont'd)

Pub. L. No. 104-208, Div. A, Tit. I, § 121, 110 Stat. 3009-26 to 3009-31. Under the CPPA, child pornography is now defined as any sexually explicit material that: (1) depicts actual minors; (2) depicts persons who appear to be minors; (3) modifies or alters the image of an identifiable minor so that the minor appears to be engaging in sexually explicit conduct; or (4) is advertised or described so as to convey the impression that it depicts a minor. *See* 18 U.S.C. § 2256(8).

Thus, in addition to banning visual depictions of real children who are actually involved in sexually explicit conduct, *see* 18 U.S.C. § 2256(8)(A), or whose images are altered, *see* 18 U.S.C. § 2256(8)(C), the CPPA also prohibits visual depictions of adults or nonpersons who "appear to be" minors engaging in sexually explicit conduct and material that, while not containing sexually explicit depictions of identifiable minors, "conveys the impression" that it might have such depictions. The "appears to be" and "conveys the impression" provisions of 18 U.S.C. § 2256(8)(B) and (D) criminalize material that was not produced using actual children and does not contain images of identifiable children, and thus, is not, in the traditional sense of the term, "child" pornography. *See* Final Report at 596 (finding that, while sexually explicit portrayals of fictional characters might "deeply offend modern sensibilities regarding the rearing and protection of children, they are not 'child pornography' in the specific legal and clinical sense that the term has acquired over the past fifteen years"). In addition, these two revolutionary phrases are not defined or otherwise explained by the CPPA or any other federal law. Under these circumstances, these two provisions mark a "significant departure" from the "permissible bounds of *Ferber*." S. Rep. No. 358, at 37.

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inter alia, mailing, transporting, receiving, distributing, reproducing, selling, or possessing *child pornography*, as redefined by the CPPA, within interstate or foreign commerce.

The CPPA further departs from *Ferber* by banning not only depictions of actual acts of sexually explicit conduct by minors, but also simulated acts of such conduct. *See* 18 U.S.C. §§ 2256(2)(A)-(E). Under the CPPA, acts between two consenting adults, who may appear to some viewers to be minors, involving only simulated, not actual, sexual activity are condemned and prohibited as illegal child pornography. The implications of this vast departure from the constitutional framework of *Ferber* are profound. Mainstream movies such as "Romeo and Juliet," "The Blue Lagoon," "Fast Times at Ridgemont High," "The Exorcist," "Pretty Baby," and "Lolita," all of which arguably depict simulated sexual activity by persons who appear to be minors,[4] can now be deemed criminal contraband, and those possessing, producing, or distributing such materials face up to fifteen years in prison.[5]

C. Warnings To Congress Regarding The Unconstitutionality Of The CPPA

The CPPA's radical alteration and expansion of "child pornography" was enacted despite protests by several members of Congress and numerous constitutional scholars who viewed the CPPA as an unconstitutional restriction on speech. Congress was repeatedly warned that the bill would not pass constitutional muster because "[b]y criminalizing all visual depictions that 'appear to be' child pornography – even if no child is ever used or harmed in its production – [the CPPA] prohibits the very type of depictions that the Supreme Court has explicitly held protected." S. Rep. No. 358, at 29. Harvard University Professor, Frederick Schauer, who was the Commissioner of the Attorney General's Commission on Pornography, was joined by fourteen other constitutional scholars in advising Congress that the CPPA

[4] *See* Bob Van Voris, "Coming Soon . . . 'Lolita,' The Lawyer's Cut," *The National Law Journal*, Aug. 17, 1998, at A1 (listing numerous films that can now be considered "child pornography" under the CPPA).

[5] First time offenders of the CPPA face up to fifteen years in prison, while repeat offenders face no less than five years and up to thirty years in prison. *See* 18 U.S.C. § 2252A(b)(1).

would be found unconstitutional, thereby rendering it useless in the battle against child pornography. *See id.* Other legislators warned Congress against the "dramatic expansion" of child pornography legislation sought by the CPPA because "[t]he Supreme Court has repeatedly held, in a number of different areas, that expression may not be regulated solely for its effect upon others." *Id.* at 37.

Additionally, after the United States District Court for the Eastern District of Pennsylvania invalidated the Communications Decency Act – another piece of legislation roundly criticized by several members of Congress and ultimately struck down by this Court[6] – for its violations of the First Amendment, *see American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), Congress was further advised that the CPPA was similarly deficient:

> This legislation marks the second occasion that this Congress has embarked upon an unconstitutional course in seeking to address activity which is being conducted via modern technology. Unfortunately, just as the Communications Decency Act sought to alter our constitutional framework, [the CPPA] departs from precedent as well. There can be no doubt that the advent of emerging computer technology poses challenges to our society on many

[6] The Communications Decency Act ("CDA") passed by Congress in February 1996 – a mere eight months before the CPPA's enactment – sought to protect minors from harmful Internet materials by banning the transmission of "indecent" or "patently offensive" communications to persons under the age of eighteen. Prior to its passage, Congress was cautioned that the CDA fell short of First Amendment standards because the "indecent" and "patently offensive" provisions were unduly vague and unnecessarily overbroad, thereby infringing upon constitutionally-protected expression. These criticisms ultimately were proven to be valid when the two criticized provisions were struck down by this Court as facially overbroad under the First Amendment. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

> fronts, some challenges are positive and some are not. However, we should not abandon the Constitution in seeking to resolve those challenges.

S. Rep. No. 358, at 38.

In response to these criticisms, the Senate added a safeguard section prohibiting the use of "identifiable minors in visual depictions of sexually explicit conduct." 18 U.S.C. § 2256(8)(C). This section was added to address the concern that the definition of child pornography "may be at risk of judicial invalidation insofar as it reaches images that do not depict actual minors," and the belief that if the "appears to be" and "conveys the impression" provisions of the CPPA were invalidated, at least the prohibition against using identifiable minors for computer morphing would remain intact. *See* S. Rep. No. 358, at 11, 31. Congress also included a severance clause providing that, if some aspect of the CPPA's new child pornography definition were to be found unconstitutional, the invalidation of one element of the definition would not necessarily render inoperable the entire statutory framework. *See* CPPA, Pub. L. No. 104-208, § 8, 110 Stat. 3009, 3009-31 (1996).

D. The Free Speech Coalition Challenges The CPPA

Fearing that the CPPA jeopardized the expressive activity of its members, the Free Speech Coalition, Bold Type, Inc., Jim Gingerich, and Ron Raffaelli (collectively "Free Speech" or "Respondents")[7] filed a complaint challenging the Act in the

[7] The Free Speech Coalition is a California trade association that assists film makers, producers, distributors, wholesalers, retailers, and Internet providers located throughout the United States in the exercise of their First Amendment rights and in defense of those rights against censorship. Free Speech represents more than six hundred businesses and individuals involved in the production, distribution, sale, and presentation of non-obscene, adult-oriented materials. *See* Pet. App. 3a. Bold Type, Inc. publishes *California's Nude Beaches*, a book dedicated to the education and expression of the ideals and philosophy associated with nudism. *Id.* Jim Gingerich is a well-known artist from (Cont'd)

United States District Court for the Northern District of California on January 27, 1997. Pet. App. 3a. The complaint asserted, *inter alia,* that the "appears to be" and "conveys the impression" provisions of the CPPA: (1) prohibit expression in violation of the First Amendment; (2) contain overbroad and vague language in violation of the Fifth Amendment's Due Process Clause; and (3) unduly chill constitutionally-protected speech in violation of the First Amendment. *See id.* at 50a.

Respondents did not challenge 18 U.S.C. § 2256(8)(A), which prohibits materials depicting actual children engaging in sexually explicit conduct. *See* Pet. App. 10a-11a. Nor did Respondents challenge 18 U.S.C. § 2256(8)(C), which prohibits computerized "morphing" of identifiable children, an activity whereby images of real and identifiable children are altered by a computer so that the children are depicted in sexually explicit conduct. *See id.* Respondents believe that, because these materials contain sexual depictions of real and identifiable children, or at least parts thereof, it is possible that such images could harm the children depicted. *See id.*

As stated in their complaint, Respondents do not advocate or tolerate the production or distribution of child pornography involving real children, and in fact have assisted in the eradication of such materials by offering and providing a reward of up to ten thousand dollars in cash to any person providing information leading to the arrest and conviction of persons involved in child pornography. Record 2. Despite Respondents' opposition to child pornography, they are nonetheless threatened and injured by the CPPA because they produce, distribute, and/or possess materials, including film, photographs, paintings, and computerized images that are, or could easily be deemed,

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New York City whose paintings include landscapes and large-scale nudes. *Id.* Ron Raffaelli is a well-known, professional photographer who specializes in erotic photography and has published four erotic books including *Rapture* by Media Press. *Id.*

sexually explicit. Although none of the materials contains sexually explicit depictions of actual minors, the persons or nonpersons depicted in these materials may appear to some viewers to be minors or the materials' advertising may convey the impression to some people that the materials contain sexually explicit depictions of minors. *See id.* at 3. In light of the fact that the CPPA prohibits materials in which there "appears to be . . . a minor engaging in sexually explicit conduct" or that are advertised, promoted, presented, described, or distributed in such a way as to "convey the impression" that a minor is engaging in sexually explicit activity, a number of persons have ceased the production, distribution, and possession of certain forms of expression, which do not involve minors, in fear of being prosecuted under the Act.[8] *Id* at 17-23 (affidavits of Gary Palao, Harlan Shapers, and George Polera).

On August 12, 1997, following cross motions for summary judgment filed by the parties, the district court issued an order and judgment upholding the constitutionality of the CPPA. *See* Pet. App. 50a-66a. Apparently subscribing to the politically-popular belief that "if a law is passed in the name of children, it must be constitutional," the district court upheld the CPPA as a content-neutral law that properly regulates the time, place, and manner of speech. *Id.* at 56a-58a. The court reasoned that "[g]iven the nature of the evils that anti-child [*sic*] pornography laws are intended to prevent, the CPPA can easily be deemed a content-neutral regulation." *Id.* at 57a. Ignoring the constitutional balance recognized in *Ferber*, the court further found that the CPPA is neither unduly overbroad nor vague and that it does not constitute a prior restraint on speech. *See id.* at 62a-64a. Based on these conclusions, the court entered judgment in favor of the Government. *See id.* at 66a.

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[8] *See* Van Voris, "Coming Soon . . . 'Lolita,' The Lawyer's Cut," *The National Law Journal*, Aug. 17, 1998, at A1 (discussing the self-censorship in the film industry caused by the CPPA).

Respondents appealed to the Ninth Circuit Court of Appeals, where the lower court's ruling was reversed. The Ninth Circuit found that the CPPA is not content neutral because it contains a blanket suppression of an entire category of speech and is not a time, place, or manner regulation. *See id.* at 14a-19a. The court determined that, even though Congress may have enacted the CPPA in part to address the secondary effects of speech appearing to depict children's sexual activity, such intent did not render it content-neutral. *See id.* Finding no demonstrable basis for linking computer-generated child pornography to the sexual abuse of children and only a minimal use of other sexually explicit materials depicting youthful-looking, real people to lure children, the court concluded that the CPPA is a content-specific ban on protected speech that is not narrowly tailored to meet a compelling governmental interest. *See id.* at 20a. The court restored the constitutional balance recognized in *Ferber*, stating:

> By criminalizing all visual depictions that "appear to be" or "convey the impression" of child pornography, even where no child is ever used or harmed in its production, Congress has outlawed the type of depictions explicitly protected by the Supreme Court's interpretation of the First Amendment. Because the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment.

Id. at 22a.

The court further found the "appears to be a minor" and "conveys the impression" provisions void for vagueness because the two phrases are "highly subjective" and "provide no measure to guide an ordinarily intelligent person about prohibited conduct and any such person could not be reasonably certain about whose perspective defines the appearance of a minor, or whose

impression that a minor is involved leads to criminal prosecution." *Id.* at 24a. The court ruled that the lack of definitions for these key phrases permits law enforcement officials to exercise their discretion in an arbitrary and discriminatory fashion. *See id.*

In addition, the court deemed the two challenged phrases to be unconstitutionally overbroad because they are "insufficiently related to the interest in prohibiting pornography actually involving minors to justify [their] infringement of protected speech." *Id.* at 26a. The court concluded that the CPPA's inclusion of constitutionally-protected activity as well as legitimately prohibited activity makes it unconstitutionally overbroad. *See id.* at 27a.

Petitioners moved the court of appeals for rehearing and rehearing en banc, but these petitions were denied. *See id.* at 44a-45a.

SUMMARY OF ARGUMENT

A. The Child Pornography Prevention Act of 1996 may well be, as Petitioners suggest, "the product of Congress's determination that advances in computer technology make possible the creation of images that are virtually indistinguishable from depictions of real children engaged in sexually explicit conduct." Pet. Brief 13. However, in enacting the CPPA, Congress failed to limit the materials it banned as child pornography to only those sexual depictions that are "virtually indistinguishable" from real children. Rather, Congress chose to ban *all* materials, however produced, which depict persons or nonpersons who "appear to be" minors or which "convey the impression" that a minor is depicted engaging in sexual conduct. As a result of the CPPA's broad language, all manner of material is banned – not just the computer-generated images argued by Petitioners. Drawings, cartoons, sculptures, and paintings involving depictions of minors, adults, and nonpersons who "appear to be minors" or which are promoted in such a way as to "convey the impression"

that minors are depicted engaging in sexual conduct are all criminalized by the CPPA. Thus, the CPPA does much more than simply ban "virtual child pornography" that is indistinguishable from depictions of actual children, and this Court's review must analyze the First Amendment implications of the CPPA's ban on each of the types of material involved.

B. The CPPA is a content-specific regulation on speech because it regulates expression based on the ideas it conveys to viewers. As such, the CPPA is presumed to be unconstitutional, *see R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992), and must be subjected to the most exacting constitutional scrutiny by this Court, *see Boos v. Barry*, 485 U.S. 312, 321 (1988). In an effort to avoid strict scrutiny analysis of the CPPA, Petitioners interpret *Ferber* to hold that the type of depictions banned by the CPPA are unprotected by the First Amendment. Pet. Brief 19 (citing *Ferber*, 458 U.S. at 764). *Ferber* made no such determination. In fact, *Ferber* specifically found that the types of materials banned by the CPPA *retained* First Amendment protections. What *Ferber* held to be unprotected were materials involving live performances or reproductions of live performances of actual children engaging in sexually explicit conduct. *Ferber*, 458 U.S. at 762, 764. According to the express holding of *Ferber*, the universe of other non-obscene materials depicting sexual conduct of children – without the use of actual children to produce the depictions – "retains First Amendment protection." *Id.* at 765. Moreover, despite Petitioners' arguments to the contrary, the "principal considerations" of *Ferber* do not provide any basis for ignoring the express holding of *Ferber* that certain types of depictions of child sexual conduct, such as those prohibited by the CPPA, are protected by the First Amendment.

C. The content-specific provisions of the CPPA are not supported by a compelling governmental interest because they exceed the Government's well-defined interest in regulating child pornography, which is limited to works that visually depict sexual conduct by actual children. *Ferber*, 458 U.S. at 764.

Although child pornography depicting real children is classified as unprotected speech, this Court has specifically endorsed the use of young-looking adults in non-obscene, sexually explicit performances to preserve that the literary, artistic, and scientific value of sexual depictions under the First Amendment. *Id.* The Attorney General's Commission on Pornography likewise adopted this limited governmental interest in regulating child pornography, stating that the term "'child pornography' *is only appropriate as a description of material depicting real children*" and that sexually explicit material using adults to depict child sexual activity "*could never be 'child pornography'*" because it does not depict an actual child engaged in sexual conduct. Final Report at 597-98 (emphasis added).

The CPPA's "appears to be" and "conveys the impression" provisions are not narrowly tailored to serve Congress' limited interest in regulating child pornography because these provisions define "child pornography" as something other than "child" pornography and punish as criminal activity constitutionally-protected expression that does not depict actual minors. The CPPA extends beyond *Ferber* and the Final Report by banning such a broad array of depictions that the message of childhood sexuality is silenced regardless of its artistic, literary, or scientific value. The CPPA also suppresses large quantities of non-obscene materials that do not depict real children engaged in sexually explicit conduct, such as movies using adult actors to depict teenage sexual activity, illustrations of childhood sexuality in scientific texts, and sexually explicit artwork depicting completely fictitious children.

Petitioners contend that the legislative findings support a compelling governmental interest in regulating sexual expression beyond the interest stated in *Ferber*. However, these findings that material depicting nonchildren are being used to: (1) seduce children into sexual activity; (2) whet the sexual appetites of pedophiles; (3) sustain the market for sexually explicit materials depicting actual children; and (4) prevent

prosecutors from obtaining convictions in child pornography cases are not supported by sufficient evidence. Thus, these findings cannot supply any governmental interest, much less a compelling one, for the CPPA's "appears to be" and "conveys the impression" provisions. Moreover, even if such evidence existed, Petitioners' findings, which all relate to the *potential conduct* of pedophiles and child molesters, are not narrowly tailored to, and cannot justify, an absolute ban on traditionally-protected forms of *expression* by law-abiding adults.

D. The CPPA's "appears to be" and "conveys the impression" provisions are unconstitutionally overbroad because they suppress vast amounts of material protected by the First Amendment. The CPPA directly contravenes this Court's holding that, if the visual depictions of sexual activity by minors "[are] necessary for literary or artistic value, a person over the statutory age who perhaps looked younger [can] be utilized." *Ferber*, 458 U.S. at 763-64. It also ignores this Court's repeated admonition that the government's interest in protecting children does not justify reducing the entire adult population to reading and viewing only what is fit for children. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 128 (1989). The "appears to be" and "conveys the impression" provisions are not limited to material that causes harm to children. These general and undefined provisions encompass inordinate quantities of film, sculpture, photography, paintings, illustrations, and drawings that bear no relationship to exploiting children.

Moreover, the CPPA's overbreadth problems are not solved by the Act's affirmative defense provision because, *inter alia*, that provision does not protect illustrators and artists who depict fictional images created solely from their imaginations or consumers and distributors who are not involved in the production of sexually explicit materials and do not know the actual age of the persons depicted.

E. The CPPA is void for vagueness under the Fifth Amendment's Due Process Clause because it fails to define the phrases "appears to be a minor" and "conveys the impression of a minor." By failing to define these critical phrases, the CPPA fails to give persons of ordinary intelligence a basic understanding of what is prohibited and gives law enforcement officials unbridled discretion to enforce the Act in arbitrary and discriminatory ways. Contrary to Petitioners' suggestion, the vagueness inherent in the CPPA cannot be remedied by Petitioners' argument that the "unsuspecting viewer" language taken from the general legislative findings (and inexplicably augmented with a "reasonable person" standard) provides the much-needed definitions for the "appears to be" and "conveys the impression" provisions left undefined by the CPPA. *See* Pet. Brief 40. Even assuming, *arguendo*, that a random phrase taken out of context from the general legislative findings of a statute can be utilized to define the text of a statute, the phrase relied on by Petitioners cannot "cure" the CPPA's vagueness. While the inserted phrase may provide guidance concerning *who* must determine what "appears to be" or "conveys the impression" of a minor, it provides no guidance whatsoever to ordinary persons who are attempting to conform their conduct to the law, or to government officials attempting to apply the law in a nondiscriminatory fashion concerning *what* "appears to be" or "conveys the impression" of a minor. Accordingly, neither the text of the CPPA nor the phrase suggested by Petitioners provide the "explicit standards" for enforcement required by the Due Process Clause, and thus the CPPA's "appears to be" and "conveys the impression" provisions are void for vagueness.

ARGUMENT

A. The Scope Of The CPPA Is Considerably Broader Than Petitioners Suggest And The Scope Of Respondents' Challenge To The Act Is Much Narrower.

1. The CPPA Bans Far More Expression Than "Virtually Indistinguishable" Forms Of Child Pornography.

Throughout their brief, Petitioners premise their arguments on a mischaracterization of the scope of the CPPA, apparently in the hope that if this Court adopts Petitioners' narrow version of the Act, the Court will forego a detailed analysis of the text of the Act and uphold its unduly broad provisions. Specifically, Petitioners repeatedly argue that the types of expression banned by the CPPA are only those computer-generated images which are "'virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.'" Pet. Brief 21, 22, 23, 25, 28, 36, 40, 42 (quoting 18 U.S.C. § 2251 note (Supp. V 1999) (Historical & Statutory Notes)). This narrowing of the CPPA has, in error, been accepted by several circuit courts and embraced by the media who refer to the CPPA as banning "virtual child pornography."[9] But the text of the CPPA bans much more expression than just the computer-generated or "virtual" child pornography suggested by Petitioners and blindly accepted by others.

The text of the CPPA bans as "child pornography":

> *any visual depiction*, including any photograph, film, video, picture, or computer or computer-generated

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[9] *See United States v. Fox*, 248 F.3d 394, 405 (5th Cir. 2001); *United States v. Mento*, 231 F.3d 912, 921 (4th Cir. 2000), *petition for cert. filed*, No. 00-8114; *United States v. Hilton*, 167 F.3d 61, 72 (1st Cir.), *cert. denied*, 528 U.S. 844 (1999); *United States v. Acheson*, 195 F.3d 645, 648-49 (11th Cir. 1999); Stuart Taylor Jr., *Is it Sexual Exploitation if the Victims are 'Virtual'?*, Newsweek, Mar. 19, 2001, at 51; Joan Biskupic, *High Court Takes on 'Virtual' Child Porn*, USA Today, Jan. 23, 2001, at 3A.

image or picture, *whether made or produced by electronic, mechanical, or other means*, of sexually explicit conduct where –

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. . . .

18 U.S.C. § 2256(8) (emphasis added).[10]

Subsection A and a portion of subsection B of the Act ban true child pornography involving the use of actual minors in the production of sexually explicit materials. *See* 18 U.S.C. § 2256(8)(A),(B). The remaining portions of subsection B and subsections C and D ban material not previously considered "child pornography." Sexually explicit depictions of adults who "appear to be" minors are banned by subsection B; computer-generated or "morphed" images of children from images of identifiable minors are banned in subsection C; and depictions which do not include a minor but which are promoted in such a way as to convey the impression that a minor is depicted are banned in subsection D. *See* 18 U.S.C. § 2256(8)(B)-(D).

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[10] The term "visual depiction" is further defined to "include[ ] undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image." 18 U.S.C. § 2256(5) (Supp. V 1999).

Thus, by its plain language, the CPPA bans four distinct categories of depictions. *See United States v. Mento*, 231 F.3d 912, 922 (4th Cir. 2000). Petitioners' repeated references to the materials banned by the CPPA as merely "depictions that are 'virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct'" are not supported, and in fact are directly refuted, by the text of the CPPA. *See* Pet. Brief 21, 22, 23, 25, 28, 36, 40, 42. The "virtually indistinguishable" language relied upon by Petitioners to limit the application of the CPPA appears nowhere in the text of the CPPA. Rather, that language appears only in the general findings of Congress, which are included as one of the historical and statutory notes contained in the annotated version of the United States Code. *See* 18 U.S.C.A. § 2251 note. Legislative findings, however, cannot be used to interject requirements into an Act that are neither expressed nor implied on its face. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994) (stating that "the quoted statement of legislative findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied in the operative sections of [RICO]").

Moreover, even if the legislative findings, taken out of context, could generally narrow the scope of the plain language of a statute, such an extreme method of statutory construction cannot be utilized to interpret a statute, such as the CPPA, where the legislative history is abundantly clear that the plain language is exactly what Congress intended it to be. In drafting the CPPA, Congress made it clear that the "appears to be" and "conveys the impression" provisions were based on the belief that "[p]ornographic depictions which *appear to be* those of children engaging in sexually explicit conduct . . . deserve no First Amendment protection." *See* S. Rep. No. 358, at 18 (emphasis added). Even after Congress was repeatedly warned that it could not "prohibit visual depictions which 'appear to be' of minors engaging in sexually explicit conduct but were produced without using actual children," it chose to "disagree" with this warning

and maintain the "appears to be" and "conveys the impression" provisions. *Id.* at 21 (noting the Senate Committee's disagreement with Professor Frederick Schauer's admonition against the challenged phrases).

Accordingly, the express language of the CPPA and the statements of members of Congress as to its scope unequivocally refute Petitioners' attempt to narrow the CPPA's prohibitions to only those computer-generated images that are "virtually indistinguishable . . . from unretouched photographic images of actual children engaging in sexually explicit conduct." The CPPA's ban on forms of expression is much broader than Petitioners' narrow characterization would suggest. Therefore, the Court must reject Petitioners' invitation to review the constitutionality of the entire Act on the basis of a more narrow scope, and instead review the constitutionality of the CPPA on the basis of the overwhelmingly broad array of materials the Act actually bans — including drawings, cartoons, sculptures, and paintings involving depictions of minors, adults, and nonpersons engaging in sexual conduct.

2. Scope Of The Challenge To This Court

That being said, it is important to note that the review of this case is limited to only those prohibitions contained in 18 U.S.C. § 2256(8)(B) and 18 U.S.C. § 2256(8)(D), the so-called "appears to be" and "conveys the impression" provisions. Respondents do not, and have never, challenged those portions of the CPPA which ban the production and distribution of materials depicting *actual* children engaged in sexually explicit conduct. *See* 18 U.S.C. § 2256(8)(A). Nor do Respondents challenge those portions of the CPPA which prohibit "morphing" the images of identifiable minors to create a depiction in which the actual minor appears to be engaging in sexually explicit conduct. *See* 18 U.S.C. § 2256(8)(C). Both of these sections ban materials utilizing actual children in the production of sexually explicit material.

Respondents only challenge, and seek protection from, those portions of the CPPA which ban material depicting adults

or nonpersons engaging in sexually explicit conduct. Specifically, Respondents challenge the constitutionality of subsections B and D of the Act which ban visual depictions of sexually explicit conduct where the "visual depiction is, or appears to be, of a minor" (18 U.S.C. § 2256(8)(B)), or where the depiction is promoted in such a manner that "conveys the impression" that the material contains a depiction of a minor engaging in sexually explicit conduct (18 U.S.C. § 2256(8)(D)). Respondents submit that these prohibitions on the visual depictions of adults and nonpersons threaten the continued creation, distribution, and presentation of many valuable and constitutionally-protected photographs, books, magazines, motion pictures, television programs, and other works of art that contain visual depictions of sexuality. As such, the CPPA's ban on these types of material violates the First Amendment.

B. The Broad Range Of Materials Banned By The CPPA's "Appears To Be" And "Conveys The Impression" Provisions Are Protected By The First Amendment And Any Restrictions On Those Materials Must Be Subjected To Strict Scrutiny Analysis.

Petitioners begin their argument to the Court by implicitly conceding, as they must, that the prohibitions contained in the CPPA are content-based restrictions on speech. Pet. Brief 19. Petitioners further acknowledge that "[l]egislation that restricts speech based upon its content is ordinarily subject to strict scrutiny and may be upheld only if it is narrowly tailored to further a compelling interest." *Id.* (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). Nonetheless, Petitioners claim that the content-based restrictions on speech contained in the CPPA do not merit strict scrutiny analysis because the newly-prohibited forms of expression fall within one of the narrowly limited classes of speech that the Court has deemed to be without First Amendment protection. Pet. Brief 19 (citing *Ferber*, 458 U.S. at 764). Petitioners' efforts to avoid the most exacting scrutiny of the CPPA are without merit.

1. *Ferber* Expressly Retains First Amendment Protections For Materials Banned By The CPPA.

In *Ferber*, this Court considered the question of whether criminal statutes could constitutionally "prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene." 458 U.S. at 753. In answering this question in the affirmative, the Court classified "child pornography" as a "category of material outside the protection of the First Amendment." *Id.* at 763. The Court, however, expressly limited the materials that constitute "child pornography" to those materials involving "live performance or photographic or other visual reproduction of live performances" of actual children engaged in sexually explicit conduct. *Id.* at 65. As for the universe of other materials, the Court expressly stated that "the distribution of descriptions or other depictions of [child] sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other depictions of live performances, retains First Amendment protection." *See id.* at 764-65.

None of the depictions banned by the "appears to be" and "conveys the impression" provisions at issue in this case involve "live performance or photographic or other visual reproduction of live performances" of children engaging in sexual conduct.[11] As such, the depictions banned by the CPPA are exactly the type of depictions held in *Ferber* to be protected by the First Amendment. *Ferber*, 458 U.S. at 764-65. Under *Ferber*, then, visual depictions banned by the CPPA, such as non-obscene drawings, cartoons, sculptures, paintings, and wholly computer-generated images of nonchildren engaging in sexually explicit conduct, are fully protected by the First Amendment.

[11] Of the types of depictions prohibited by the CPPA, only those involving the reproduction of live performances by actual children engaging in sexually explicit conduct, (18 U.S.C. § 2256(8)(A)), and those involving "morphed" depictions of identifiable minors engaging in sexually explicit conduct, (18 U.S.C. § 2256(8)(D)), would fall within the ambit of the types of materials deemed by the *Ferber* Court to be without First Amendment protections.

Even if *Ferber* had not explicitly stated that depictions not involving a live performance or its reproduction retain First Amendment protection, the reasoning of *Ferber* makes clear that in exempting certain types of depictions from First Amendment protection, this Court was solely concerned with protecting actual children from being abused in the production of sexually explicit materials. 458 U.S. at 758, 764 (stating that "[t]he legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child" and holding that "the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specific age"). *Ferber* never suggested in any way that materials, such as those banned by the CPPA, produced without the use of any actual children were not deserving of First Amendment protection. *See id.* at 763.

For the reasons stated above, the depictions banned by the CPPA fall within the category of non-obscene depictions of sexual conduct of children expressly deemed by *Ferber* to retain the protections of the First Amendment.

2. The "Principal Considerations" Of *Ferber* Do Not Lead To The Conclusion That The Types Of Materials Banned By The CPPA Are Unprotected By The First Amendment.

Despite Petitioners' argument to the contrary, the "principal considerations" outlined in *Ferber* do not provide any basis for this Court to ignore the specific statements in *Ferber* that certain types of depictions of child sexual conduct *are* protected by the First Amendment. Nor do those considerations provide a basis for holding that the broad array of materials banned by the CPPA fall outside the protections of the First Amendment. *See* Pet. Brief 20-27.

First, Petitioners correctly note that *Ferber* found that "[t]he prevention of sexual exploitation and abuse of children

constitutes a government objective of surpassing importance." *Ferber*, 458 U.S. at 757. Petitioners then rotely state that the goal of the CPPA is to protect children from sexual exploitation. Pet. Brief 21. What Petitioners fail to recognize is that the exploitation and abuse addressed by *Ferber* was the production (and subsequent distribution) of sexually explicit material *using actual children*, not the production or distribution of sexually explicit material produced without involving actual children, which is what the CPPA bans. The government interests in these two situations are vastly different, as is addressed more fully below.

Second, Petitioners also correctly note that *Ferber* states "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children" because the "materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation" and because the production of such harmful materials cannot be stopped without stopping their distribution. Pet. Brief 21 (quoting *Ferber*, 458 U.S. at 759). Again, however, Petitioners fail to acknowledge that *Ferber* was concerned only with the sexual abuse inherent in the *production* of sexually explicit materials using actual children. Instead, Petitioners attempt to justify the CPPA's broad ban on materials even when they are produced without the use of actual children by arguing, not that the materials banned by the CPPA are "intrinsically related" to the sexual abuse of children, but that they "foster" the sexual abuse of children. Pet. Brief 21. This is a very different question from the one considered by *Ferber*. Even if it were a proper question, however, two of the arguments Petitioners use to address it are an impermissible back-door attempt to justify a restriction on speech due to its effects and the other two are weak attempts to make analogies to the enforcement concerns described by *Ferber*.[12]

[12] The fact that these arguments also are not narrowly tailored to meet a compelling governmental interest is discussed below in Part C3.

Specifically, Petitioners argue that sexually explicit materials produced without the use of actual children could potentially harm children by: (1) being used to seduce children; and (2) being used to excite pedophiles. Pet. Brief 22-24. These arguments can be made about many things, including (for seduction) sexually explicit non-obscene images of adults and (for exciting pedophiles) non-sexual depictions of children. Moreover, these arguments do not approach the level of *direct* harm addressed by *Ferber*, *i.e.*, children being forced to engage in sexual conduct to produce sexually explicit material. Clearly, if accepted, these arguments that potential negative effects resulting from speech justify ignoring the First Amendment could be used to support a claim that almost any class of speech is outside the protections of the Constitution.

Petitioners also argue that sexually explicit materials produced without the use of actual children can foster the abuse of children because: (1) it could be difficult for law enforcement to prove whether a particular image was produced using an actual child, thus allowing persons who produce images using actual children to evade justice; and (2) images produced without the use of actual children can be traded for images produced using actual children, thus supporting the market for such materials. Pet. Brief 23-24. Neither of these arguments rise to the level of the concern raised in *Ferber*, namely that productions of sexually explicit material using actual children cannot be stopped without stopping distribution, because neither argument establishes that the production of materials using actual children cannot be stopped without also banning the materials covered by the CPPA. They also do not justify the CPPA's broad ban[13] and could logically be applied to ban almost anything.[14]

[13] For example, on the enforcement issue, a sketch, cartoon, sculpture, etc. can clearly be distinguished from materials produced using actual children.

[14] For example, adult non-obscene pornography and cash might be exchanged for sexual depictions produced using actual children.

Third, Petitioners note that *Ferber* held that live performances of children engaging in sexually explicit conduct or visual reproductions thereof were "unlikely" to "often constitute an important and necessary part of a literary performance." Pet. Brief 24 (quoting *Ferber*, 458 U.S. at 762-763). But Petitioners fail to mention that *Ferber* explicitly provided that, to the extent a sexual message was important for literary, scientific, educational or artistic purposes, it could be delivered by using young-looking adults or some other form of "simulation" in the visual depiction. *See Ferber*, 458 U.S. at 763. *Ferber* only prohibited the option of rendering a portrayal of sexual conduct of children more realistic "by utilizing or photographing children." *Id.* at 763. Yet, contrary to Petitioners' argument, it is exactly these types of simulations that are banned by the CPPA's "appears to be" and "conveys the impression" language.

Finally, Petitioners ignore the fourth and fifth considerations of the *Ferber* analysis. In its fourth consideration, *Ferber* justified the ban on live performances or visual reproductions of children engaging in sexual conduct on the grounds that it supported and provided an economic motivation for an illegal activity – the sexual exploitation and abuse of the children used in the production of the materials. *Ferber*, 458 U.S. at 761-62. The materials banned by the CPPA that are at issue here have no relation to any such illegal activity, as they are produced without the use of actual children. In its fifth consideration, *Ferber* justified its holding that live performances or visual reproductions of children engaging in sexual conduct are forms of expression outside the protections of the First Amendment on the basis that such a holding was not "incompatible" with the Court's earlier decisions. *Id.* at 763-64. Given that *Ferber* specifically stated that depictions of childhood sexuality that did not involve a live performance by an actual child or a visual reproduction thereof were protected under the First Amendment, any holding that the CPPA's ban

on materials that do not involve any actual children is constitutional would be incompatible with this Court's earlier decisions.

For all these reasons, the "considerations" of *Ferber* in no way lead to a conclusion that the materials banned by the CPPA are not fully protected by the First Amendment. Thus, because the CPPA restricts expression that is clearly protected, it must be reviewed under strict scrutiny analysis, the most exacting form of constitutional scrutiny. *See Boos v. Barry*, 485 U.S. 312, 319 (1988). "To survive this scrutiny, the government must advance a compelling interest served by its regulation of the content of protected speech, and the regulation must be narrowly tailored to serve that interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

C. The "Appears To Be" And "Conveys The Impression" Provisions Are Not Narrowly Tailored To Serve A Compelling Governmental Interest.

1. The Government's Interest In Regulating Child Pornography Is Properly Limited To Sexually Explicit Materials Depicting Actual Children.

For nearly two decades, this Court has made it clear that the Government's interest in regulating and defining child pornography, as compelling as it may be, is "limited to works that *visually* depict sexual conduct by children below a specified age." *Ferber*, 458 U.S. at 764 (footnotes omitted). Although the Court has classified child pornography as speech unprotected by the First Amendment, the Court has specifically endorsed the use of young-looking adults in non-obscene, sexually explicit performances so that the literary, artistic, and scientific value of sexual depictions can be preserved under the First Amendment. *See id.* Accordingly, the Court has made it clear that Congress can ban child pornography as a category of speech only to the extent that the proscribed material portrays sexually explicit conduct by actual children. *See id.* at 764.

The Government's well-defined interest in regulating child pornography is reinforced by the Final Report issued by the

Attorney General's Commission on Pornography in 1986. In this Report, the Commission noted, "[i]t is clear from the Court's language [in *Ferber*], and in all statutory and scholarly definitions of the term, that 'child pornography' *is only appropriate as a description of material depicting real children*." Final Report at 597 (emphasis added). The Commission further stated that sexually explicit material that uses adults to depict child sexual activity "*could never be 'child pornography'*" because it does not depict an actual child engaged in sexual conduct. *Id.* at 598 (emphasis added).

The limitations placed on Congress in *Ferber* and reinforced in the Final Report are necessary to ensure that, in the process of protecting children, the rights of adults do not get left behind. As this Court has frequently explained, the Government cannot "reduce the adult population . . . to reading [and viewing] only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Consistent with this admonition, this Court has repeatedly held that non-obscene material depicting adults engaged in sexually explicit conduct, whether in the form of printed material, film, telephone communications, computerized images, or live performances, is protected by the First Amendment.[15] The fact that non-obscene speech may be offensive to some individuals does not justify its suppression. *See Carey v. Population Serv. Int'l*, 431 U.S. 678, 701 (1977).

Given the fundamental rights of adults to view non-obscene material which does not depict actual children, Congress' interest in regulating child pornography is, and must continue to be, limited to the regulation of sexually explicit materials depicting or using real children.

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[15] *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-76 (1997) (indecent images on the Internet); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (nude dancer performing in an adult bookstore); *Sable Communications*, 492 U.S. at 126 (indecent "dial-a-porn" telephone communications); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12 (1975) (motion pictures exhibiting nudity); *Kois v. Wisconsin*, 408 U.S. 229, 231-32, (1972) (sexually explicit poetry); *Butler*, 352 U.S. at 383-84 (books deemed harmful to children).

2. The CPPA's "Appears To Be" And "Conveys The Impression" Provisions Are Not Narrowly Tailored To Serve The Government's Interest In Regulating Sexually Explicit Material Depicting Actual Children.

The CPPA's "appears to be" and "conveys the impression" provisions are not narrowly tailored to serve the government's interest in regulating child pornography identified in *Ferber* because those provisions define "child pornography" as something other than "child" pornography and outlaw constitutionally-protected expression that does not utilize images of actual children.

The CPPA bans sexually explicit depictions of adults who happen to "appear to be minors." 18 U.S.C. § 2256(8)(B). And it outlaws visual depictions that are advertised, promoted, presented, described, or distributed in such a manner as to "convey the impression" that they contain sexually explicit depictions of minors, even though the images or performers are not actually children. 18 U.S.C. § 2256(8)(D). In so doing, the CPPA: (1) prohibits exactly what *Ferber* stated a narrowly-tailored child pornography statute must not prohibit – such a broad array of depictions that the message of childhood sexuality is silenced regardless of its artistic, literary, or scientific value,[16] *see Ferber*, 458 U.S. at 762-63; and (2) prohibits exactly what this Court has said that *all* forms of legislation must not prohibit – non-obscene material depicting adults engaged in sexually explicit conduct, *see Reno*, 521 U.S. at 874-76.

Pursuant to 18 U.S.C. § 2256(8)(B), if material appears to depict a minor engaged in sexually explicit conduct, even when in reality it does not, it is nonetheless deemed "child pornography." Under this provision, using adult actors or "body

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[16] *See* Van Voris, "Coming Soon . . . 'Lolita,' The Lawyer's Cut," *The National Law Journal*, Aug. 17, 1998, at A1 (citing a film director as stating, "I think [the CPPA is] a difficult law because it does not permit a filmmaker to accurately depict the world we live in").

doubles" to depict teenage sexual activity in films, such as "Risky Business," "The Blue Lagoon," and "Dirty Dancing," is now banned. Depictions of childhood sexuality found in medical treatises, child psychology textbooks, and teenage safe-sex manuals are now off-limits. And the display of sexually explicit art depicting children, such as ancient Greek vases[17] or Balthus' famed erotic paintings,[18] is now punishable by up to fifteen years in prison for a first-time offense. *See* 18 U.S.C. § 2252A(b)(1).

Similarly, under 18 U.S.C. § 2256(8)(D), if a visual depiction is advertised, promoted, presented, described, or distributed in such a manner as to convey the impression that it contains a sexually explicit depiction of a minor, even though it does not, it is nevertheless treated as child pornography. Consequently, the marketing of such movies as "Fast Times at Ridgemont High," "Pretty Baby," or "Lolita" converts these and other movies with similarly-suggestive titles into child pornography.

Simply stated, the CPPA's "appears to be" and "conveys the impression" provisions ban vast amounts of constitutionally-protected speech that do not involve actual children and eliminate all visual messages of childhood sexuality regardless of their artistic, literary, or scientific value. As such, these provisions are not narrowly tailored to meet Congress' interest in regulating true child pornography, and thus do not satisfy the rigors of constitutional strict scrutiny.

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[17] The Attorney General's Commission on Pornography observes that artwork depicting children engaged in sexual intercourse dates at least from Ancient Greece. *See* Final Report at 596 (citing photographic vase drawings in K.J. Dover, *Greek Homosexuality* (1978)). *See also* Reay Tannahill, *Sex in History* 67, 91 (1992) (illustrating artwork from Ancient Greece and Egypt depicting childhood sexual activity).

[18] *See United States v. Fox*, 248 F.3d 394, 405 n.51 (5th Cir. 2001) (referring to Balthus as the artist "whom Miro called the greatest realist painter of his age, . . . known, among other things, for his erotically charged paintings of young girls").

3. The Legislative Findings Do Not Support A Compelling Governmental Interest In Regulating Sexual Expression Involving No Actual Children And The "Appears To Be" And "Conveys The Impression" Provisions Are Not Narrowly Tailored To Meet The Purported Findings.

Petitioners suggest that their interest in enacting the CPPA is not limited to protecting real children depicted in sexually explicit material because the legislative findings show that new photographic and computer technologies that produce "virtual" child pornography (wherein no actual children are used or depicted) are being used to harm children. *See* Pet. Brief 2-25. Specifically, Petitioners contend that these "virtual" materials are being used to: (1) support pedophilic activity by seducing children into sexual activity and whetting the sexual appetites of pedophiles; (2) sustain the market for sexually explicit materials depicting actual children; and (3) prevent prosecutors from obtaining convictions in child pornography cases. *See id.* Petitioners claim that these methods of using "virtual" child pornography exploit children and supply a compelling governmental interest for the CPPA's "appears to be" and "conveys the impression" provisions. Petitioners' argument is without merit.

A closer look at the legislative findings proves Petitioners' claims to be untrue and/or overstated. These findings do not establish that sexually explicit material depicting an image that "appears to be" a minor or that is promoted so as to "convey the impression" that a minor is depicted, is being used to harm actual children. More fundamentally, even if such evidence existed, Petitioners' proffered interests, which all relate to the *potential conduct* of pedophiles and child molesters, do not justify an absolute ban on traditionally-protected forms of *expression* for all adults.

(a) *Pedophiles' Purported Use Of Child Pornography To Whet Their Sexual Appetites And To Seduce Children.*

In an effort to support the CPPA's "appears to be" and "conveys the impression" provisions, Petitioners suggest that there is an epidemic of computer-generated materials depicting virtual, not actual, children being used by sexual offenders to whet their sexual appetites and to seduce children. *See* Pet. Brief 21-25. But Petitioners' claims are not supported by the evidence.

As the court of appeals correctly noted, factual studies linking computer-generated materials depicting no identifiable children to the sexual abuse of children do not exist, and thus there is no "demonstrated basis to link computer-generated images with harm to real children." Pet. App. 20a. The evidence presented to Congress, and the findings made by Congress, fail to identify even one incident, much less a compelling number of incidents, where a pedophile used computer-generated, sexually explicit materials involving no actual children to seduce other children or to whet the pedophile's own sexual appetites.[19]

[19] The evidentiary focus of the Senate Report was the threat to children posed by computerized morphing – the act of taking images of identifiable children and altering them via computer to make it appear as though the minor is engaging in sexually explicit conduct. *See* S. Rep. No. 358, at 16 (claiming that a child molester or pedophile "can create, alter or modify a perfectly innocuous image or picture of a child he finds sexually attractive or desirable and produce any manner and number of pornographic depictions featuring that child, which he can use to stimulate his own sexual appetite for that particular child, with potentially tragic consequences for the child [or] [t]he computer produced depictions could be shown to the child in an effort to seduce or blackmail the child into submitting to sexual abuse or exploitation, or to other children who know the depicted child in order to seduce them"); *id.* at 26 (citing a man who "posed as a social service worker and photographed young girls in the nude and 'electronically manipulat[ed] the photos on his home computer to switch faces and body parts of little girls"). This conduct, however, is prohibited by

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Absent such evidence, Petitioners are hard-pressed to suggest that there is any interest, much less a compelling one, to protect children from harms associated with images of persons who are not actual children.

Even if there were sufficient evidence linking sexually explicit materials in which no actual children are depicted and the whetting of sexual appetites or the seduction of children, the "appears to be" and "conveys the impression" provisions would still be unconstitutional because they are not narrowly tailored to confront these types of harm. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (explaining that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Reno*, 521 U.S. at 875 ("[t]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity."). Both provisions ban constitutionally-protected speech based on the theory that the message conveyed in such expression may affect the thoughts and feelings of child molesters and children. Such a basis for suppressing speech has been soundly and repeatedly rejected by this Court. *See Stanley v. Georgia*, 394 U.S. 557, 566 (1969) ("[the Government] cannot premise legislation on the desirability of controlling a person's private thoughts"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (the government may not regulate speech based on its substantive content or the message it conveys); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (allowing the Ku Klux Klan to express racist views); *Carey*, 431 U.S. at 701 ("where obscenity

(Cont'd)

18 U.S.C. § 2256(8)(C), which bans visual depictions "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." This provision alone – without the assistance of the "appears to be" or "conveys the impression" provisions – addresses the real interest presented to Congress regarding the exploitation of children by computerized morphing.

is not involved, [the Court has] consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

In sum, the CPPA's "appears to be" and "conveys the impression" provisions are not supported by, or narrowly tailored to, any governmental interest in preventing pedophiles from misusing constitutionally-protected forms of expression. Simply put, if Congress wants to prevent the seduction of children, it must target the *illegal conduct* of pedophiles without unnecessarily encroaching upon the constitutionally-protected *expression* of law-abiding adults.[20]

(b) *Pedophiles' Purported Trading Of "Virtual" Child Pornography In The Child Pornography Market*

Petitioners also claim that the "appears to be" and "conveys the impression" provisions are justified by a compelling governmental interest in eliminating the sexual depictions of adults and nonchildren, which are used as "currency" in trading for pictures of real children engaging in sexually explicit conduct. Pet. Brief 38-39. In support of this theory, Petitioners cite portions of testimony where it is claimed that "virtual" child pornography is traded for other child pornography, which depicts actual children. *Id.* at 38. But there are no findings that sexually explicit material depicting no actual or identifiable children has ever been used to trade for child pornography depicting actual children. Essentially, Petitioners are playing "fast and loose" with the testimony and evidence presented to Congress. They cite studies containing ostensibly-empirical findings on sexually explicit material depicting actual children,

[20] The CPPA closely resembles many other unconstitutional attempts by Congress to ban constitutionally-protected material in the name of "saving the children." *See Reno*, 521 U.S. at 874-75 (striking down federal regulations on "indecent" material on the Internet); *Sable Communications*, 492 U.S. at 128 (rejecting a ban on "dial-a-porn" messages); *Bolger*, 463 U.S. at 73 (invalidating a ban on mailing unsolicited advertisements for birth control); and *Butler*, 352 U.S. at 383-84 (rejecting a ban on all sales of books deemed harmful to children).

and then ask this Court – and everyone else – to make the careless assumption that these findings also apply to material in which no actual or identifiable children are depicted.

For example, Petitioners claim that "[t]here was also substantial testimony presented to Congress that pedophiles exchange pictures *of children* engaged in sexual activities."[21] But Petitioners make no claim and offer no empirical evidence that pedophiles are also exchanging "appears to be" and "conveys the impression" type materials for pictures of real children. Petitioners also cite Kenneth Lanning's *Collectors in Child Pornography and Sex Rings* (Ann Burgess et al. eds., 1984) for the proposition that "child pornography and erotica" are used by pedophiles to trade for access to real children or for other depictions of children. Pet. Brief 38. But there is nothing cited from this text regarding the use of sexually explicit materials that do not depict actual children to trade for sexually explicit materials depicting actual children. Moreover, the fact that Lanning's book was published in 1984 – long before the so-called "new technologies" relied upon in the CPPA's legislative findings – is a clear indication of its immateriality to the modern forms of expression purportedly targeted by the CPPA. Plainly, this is not the type of "compelling" evidence necessary to impose fundamental and overreaching restrictions on material protected by the First Amendment.

Even if there were evidence that materials depicting no actual children were being used as "currency" in the market for actual-child pornography, the "appears to be" and "conveys the impression" provisions are not narrowly tailored to serve the Government's interest in regulating this problem. The problem, if it exists at all, is *the transaction* of "virtual" material for real child pornography, not the *expression of ideas* found in such materials. As such, any regulation of this purported problem should address the *conduct* of trading, and not the message found in traded materials that depict no actual children.

[21] Pet. Brief 38 (emphasis added) (citing Dr. Cline, Deputy Chief Postal Inspector Dupilka, and Bruce Taylor).

See Rubin v. Coors Brewing Co., 514 U.S. 476, 490-91 (1995) (invalidating a ban on disclosure of alcohol content on beer labels because the government could have pursued alternatives such as limiting the alcohol content of beer).

No one would claim that Congress could ban money, credit cards, or non-obscene "adult" pornography simply because these items are also being used to purchase or trade for sexually explicit material depicting real children. Instead, there are laws that focus on and prohibit the root of the child pornography trade problem – the *transfer* of material depicting actual children. For example, persons are prohibited from knowingly mailing, transporting, or shipping child pornography in interstate commerce. *See* 18 U.S.C. § 2252A(a)(1). And persons are further prohibited from selling child pornography, including computer-generated images of identifiable children. *See* 18 U.S.C. § 2252A(a)(4). These laws impose punishment regardless of the type of "currency" used to trade for child pornography and without encroaching upon individual rights protected by the First Amendment.

Again, Petitioners' "trading" argument fails to support either that the CPPA's "appears to be" or "conveys the impression" provisions support a compelling governmental interest or that they are narrowly tailored to serve that interest.

(c) *Pedophiles' Purported Use Of Materials Depicting No Actual Children To Escape Conviction.*

Petitioners also claim that the "appears to be" and "conveys the impression" provisions are supported by a governmental interest to "make sure that those who distribute and possess images depicting real children engaged in sexual activity do not escape prosecution and conviction." Pet. Brief 37. Petitioners contend that federal prosecutors have had difficulty in securing convictions in child pornography cases because it is difficult for them to meet their evidentiary burden of showing that the person depicted in sexually explicit materials is an actual child. *See id.* at 37. Petitioners speculate that, if prosecutors continue

to struggle to meet their burden of proof, child pornographers might be able to avoid conviction.[22] *See id.*

Despite these claims, Petitioners fail to offer a single instance where a child pornographer has escaped conviction by claiming that depictions in the prosecuted material were not proven beyond a reasonable doubt to be actual children. To the contrary, prosecutors have secured convictions in all child pornography cases where this defense was asserted. *See infra* note 23. In fact, the legislative findings do not offer a single case involving child pornography where the government was unable to satisfy its burden of proof because the accused raised a "virtual child" defense. The only case cited in these findings is *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996), *see* S. Rep. No. 358, at 17, and the defendant in that case was convicted. Petitioners cite four additional cases that were not included in the legislative findings where defendants argued that "the pictures they were accused of possessing were not of real children."[23] Pet. Brief 37-38, n.8. But none of the defendants in these cases escaped conviction. Thus, factually speaking, Petitioners' interest in securing convictions in child pornography cases by reducing the prosecutors' burden of proof is far from compelling.

Moreover, even if Petitioners' interest were compelling, the assertion of the "virtual child" defense in a handful of cases does not justify the total suppression of all sexually explicit materials that depict persons who "appear to be" minors or that

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[22] Petitioners claim that the situation warrants a reduction in the burden on law enforcement officials by allowing them to simply demonstrate that the depictions in the targeted material "appear to be" of minors engaged in sexual conduct or that the promotion of such material "conveys the impression" that minors are engaged in such conduct. Pet. Brief 21.

[23] Petitioners cited *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001); *United States v. Coleman*, 54 M.J. 869 (Army Ct. Crim. App. 2001); *United States v. Vig*, 167 F.3d 443 (8th Cir.), *cert. denied*, 528 U.S. 859 (1999); Appellant's Brief filed in *United States v. Marvin Hersh*, No. 00-14592-CC (11th Cir. 2001).

are promoted to "convey the impression" that minors are depicted. If Congress wanted to restrict a particular defense available to accused child pornographers, it should have focused its legislative efforts on the defense itself, not on the banning of entire categories of speech. *See Reno*, 521 U.S. at 874 (governmental interest in protecting children from harmful materials does not justify an "unnecessarily broad suppression of speech").

In addition, even assuming *arguendo* that prosecutors have recently had to work a little harder to detect images of actual children in some child pornography cases, that does not give Congress the authority to lighten the work-load of prosecutors by shifting the burden of proof to defendants in all such cases. Indeed, the Due Process Clause of the Fifth Amendment forbids it. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (stating that under 18 U.S.C. § 2252, the government must prove defendant knew that material was produced with the use of a minor); *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992) (Congress' compelling interest in protecting children from the harms of sexual abuse does not justify the alteration of general rules of criminal procedure). In fact, it is hard to imagine how reducing the government's burden in criminal cases can, in any sense, be regarded as a compelling governmental interest for suppressing speech under the First Amendment. Plainly, defendants in child pornography cases cannot be required to prove the government's case. If the government makes the allegation that a child was depicted in sexually explicit conduct, it is the government that must prove that the "child" was in fact a child.

In sum, the CPPA's "appears to be" and "conveys the impression" provisions fail the rigors of strict scrutiny analysis because they are not narrowly tailored to support a compelling governmental interest. Accordingly, the court of appeals was correct in concluding, as a matter of law, that the CPPA's "appears to be" and "conveys the impression" provisions unconstitutionally ban protected speech.

D. The CPPA's "Appears To Be" And "Conveys The Impression" Provisions Are Unconstitutionally Overbroad.

Legislation regulating speech is impermissibly overbroad when it includes within its sweep not only activity that can legitimately be prohibited, but also activity that is constitutionally protected under the First Amendment. *See Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Although the government has an interest in protecting children from harmful materials, that interest does not justify an unnecessarily broad suppression of speech addressed to adults. *See Reno*, 521 U.S. at 875.

1. The "Appears To Be" And "Conveys The Impression" Provisions Ban Vast Amounts Of Constitutionally-Protected Speech.

The CPPA's plain language, which bans both sexually explicit visual depictions of adults and nonpersons who "appear to be" minors and promotional materials that "convey the impression" that there may be depictions of minors, is unconstitutionally overbroad because it impermissibly suppresses material that is protected by the First Amendment. The CPPA directly contravenes this Court's precedent that, if the visual depiction of sexual activity by minors "[is] necessary for literary or artistic value, a person over the statutory age who perhaps looked younger [can] be utilized." *Ferber*, 458 U.S. at 763-64. Under the guise of protecting children, Congress has impermissibly cast its legislative net far beyond the permissible target of child pornography and into the waters of protected speech.

The CPPA's "appears to be" and "conveys the impression" provisions are not limited to material that causes harm to children. Rather, these general and undefined provisions encompass inordinate quantities of film, sculpture, photography, paintings, illustrations, and drawings.

See Reno, 521 U.S. at 877 (finding the CDA's "indecent" and "patently offensive" phrases to "cover large amounts of nonpornographic material with serious educational or other value"). In so doing, the phrases ban serious literary, artistic, scientific, and educational materials, which are neither obscene nor harmful to children. As a result, the Act reduces the entire adult population to viewing only what Congress perceives (wrongly) as being fit for pedophiles, child molesters, and children.

The breadth of the CPPA's content-based restriction of speech "imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the [CPPA]." *See Reno*, 521 U.S. at 879. Petitioners have offered no such explanation. Instead, Petitioners attempt to save the two challenged provisions from an overbreadth invalidation by claiming that the law addresses only material that is "virtually indistinguishable" from depictions of real children and does not reach drawings, cartoons, sculptures, and paintings. *See* Pet. Brief, 42-44. But, again, the phrase "virtually indistinguishable" is found nowhere in the text of the CPPA. Rather, the phrases "appears to be a minor" and "conveys the impression of a minor" are the operative terms used to define the scope of the Act.

Moreover, the CPPA applies to "*any visual depiction*, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means." 18 U.S.C. § 2256(8) (emphasis added). As a result, nothing in the CPPA limits its provisions to "virtually indistinguishable" materials or exempts them from reaching drawings, cartoons, sculptures, and paintings. In fact, the specific language of the Act expressly applies to such traditionally-protected forms of speech. No matter how many times Petitioners repeat the phrase "virtually indistinguishable," it does not magically make it a part of the legislation, and it certainly does not make the CPPA any less broad.

Petitioners further claim that the potential for harm inflicted by "virtual" children depicted in sexually explicit materials containing no actual children justifies the CPPA's "appears to be" and "conveys the impression" provisions. Pet. Brief 22. The implications of this theory are both unlimited and alarming. Taken to its logical end, this theory – that the depiction of virtual, not actual, conduct can be used to ban speech – could be used to suppress countless forms of expression simply because they simulate what "appears to be" or "conveys the impression of" unfavorable conduct. Movie producers could be censored from producing such films as "Rambo," "Braveheart," "Pulp Fiction," and "The Godfather" because the simulated killing depicted in these films "appears to be" real homicide. High school drama groups could be banned from performing Shakespeare's "Romeo and Juliet" because teenage suicide "appears to be" depicted. And theater groups could be prohibited from promoting the musical "Best Little Whorehouse in Texas" because the title "conveys the impression" that illegal prostitution is depicted. This is the slippery slope of suppression that the CPPA invites us all to travel.

2. The Affirmative Defense Does Not Remedy The Inherent Overbreadth Problems Of The "Appears To Be" And "Conveys The Impression" Provisions.

Petitioners attempt to "cure" the CPPA's overbreadth problems by invoking the Act's affirmative defense provision. *See* Pet. Brief 44. Under this provision, a person charged with *producing or distributing* alleged child pornography must demonstrate that: (1) the material was produced using an actual person; (2) the actual person was an adult; and (3) the person charged did not advertise or promote the material in such a manner as to convey the impression that it contains a visual depiction of a minor. *See* 18 U.S.C. § 2252A(c). The defense requires persons charged with *possessing* alleged child pornography to prove that: (1) there were three or fewer images; and (2) either the images were destroyed or reported and

provided to law enforcement officers. *See* 18 U.S.C. § 2252A(d). This defense, however, does not remedy the expansive "appears to be" and "conveys the impression" provisions because it excludes from its protection countless numbers of presumptively-protected materials.[24] As such, the defense fails to narrowly and properly tailor the enormously broad prohibitions on speech imposed by the "appears to be" and "conveys the impression" provisions.

For instance, the affirmative defense's requirement that persons charged with producing or distributing "child pornography" must show that their work "was produced using an actual person or persons engaging in sexually explicit conduct," 18 U.S.C. § 2252A(c)(1), renders the defense useless for illustrators and artists such as Respondent Jim Gingerich

[24] In addition, the affirmative defense, coupled with the CPPA's "appears to be" and "conveys the impression" provisions, creates an unconstitutional presumption that, if images in sexually explicit materials "appear to be" of minors or the promotion of such materials "conveys the impression" that minors are depicted, these materials, in fact, depict real minors. Under these provisions, the Government is no longer required to prove that the person depicted in proscribed materials was an actual minor — an essential element in child pornography cases. Instead, the burden of proving this requisite element is shifted to the defendant who must demonstrate the actual age of the performer as a part of the affirmative defense. *See* 18 U.S.C. § 2252A(c). To shift this burden, the Government only needs to show that the person depicted "appears to be" a minor or that the material was promoted in such a manner as to "convey the impression" that a minor is depicted. *See* 18 U.S.C. § 2256(8)(B) and (D). This presumption unconstitutionally relieves the Government of its burden of proof on an essential element of the offense. *See X-Citement Video, Inc.* 513 U.S. at 78 (prosecution required to prove defendant knew material was produced with the use of a minor); *Sandstrom v. Montana*, 442 U.S. 510, 525 (1979) (criminal jury instructions presuming a person intends the ordinary consequences of his voluntary act denies defendant due process); *Patterson v. New York*, 432 U.S. 197, 215 (1977) (defendant's due process rights violated when a presumption requires him to prove that he acted in the heat of passion upon sudden provocation).

whose sexually explicit works often depict images of persons created solely from the mind of the artist. Record 3. The affirmative defense also does not protect producers and distributors of computer-generated images who do not depict identifiable persons, but who create images exclusively from their imaginations.[25] Thus, producers and distributors who are prosecuted under the CPPA for creating or distributing a sexually explicit image of a person who appears to be a minor, but who is not in fact a real person, will not be exempt from criminal punishment because the producers cannot meet the first requirement of the affirmative defense. *See* 18 U.S.C. § 2252A(c)(1).

Second, the affirmative defense offers no protection to consumers and distributors who are not involved in the production of sexually explicit materials, and thus, have no way of knowing whether persons depicted in the materials are minors or, in some cases, real persons. This problem is compounded by the fact that the CPPA applies to *all* materials currently available and makes no concessions for the time period in which the material was produced. Thus, if retailers are prosecuted for distributing materials produced in the 1970s, prior to the enactment of federal record-keeping laws,[26] it would be nearly impossible to prove that the persons depicted in the materials were adults at the time the materials were produced.

Third, the affirmative defense contains the same vague language found in the CPPA's definition of child pornography because it requires a defendant charged with

[25] As the court of appeals correctly observed, the "appears to be" and "conveys the impression" provisions "criminalize the use of fictional images that involve no human being, whether that fictional person is over the statutory age and looks younger, or indeed, a fictional person under the prohibited age. Images that are, or can be, entirely the product of the mind are criminalized." Pet. App. 16a.

[26] These requirements were not instituted until 1988 when Congress passed the Child Pornography and Obscenity Enforcement Act. *See* 18 U.S.C. § 2257.

producing or distributing child pornography to show that the material was not promoted "in such a manner as to convey the impression" that it contained a illegally-depicted minor. 18 U.S.C. § 2252A(c)(3). This defense essentially attempts to limit the scope of the "conveys the impression" provision by using the same extraordinarily broad and undefined language. Under this circular framework, producers and distributors must satisfy the same vague standards that they are accused of violating. *See* 18 U.S.C. § 2256(8)(D); *see also* Part E of this argument *infra* (discussing the vagueness of this provision). This double dose of ambiguity further illustrates the insufficiency of the CPPA's affirmative defense. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991).

Fourth, the affirmative defense offers no protection to those who possess material containing more than three sexually explicit images of persons who "appear to be" minors. The affirmative defense offers little, if any, narrowing of the CPPA for persons such as Respondent Bold Type, Inc., whose books on nudism may be wrongly interpreted as depicting minors engaging in sexually explicit conduct; Jim Gingerich, whose multiple paintings may be incorrectly viewed as depicting minors engaging in sexually explicit conduct; and Ron Raffaelli, whose erotic photography and books may also be inaccurately viewed as depicting children. Record 3. Still others who possess video collections, which include more than three films such as "Friday the 13th," "Taxi Driver," "Risky Business," "Fast Times at Ridgemont High," "Lolita," and "The Tin Drum," have absolutely no defense under 18 U.S.C. § 2252A(d) because they possess more than three images of so-called "child pornography."

And finally, even those persons who possess three or fewer images of persons who "appear to be" minors or whose advertising suggests the images might be of minors, must destroy or voluntarily forfeit these images in order to be protected. *See* 18 U.S.C. § 2252A(d). Thus, in order for persons to protect their expression under the CPPA, they must destroy

it. Such convoluted logic – to protect expression, you must destroy it – exposes the affirmative defense for what it truly is – a grossly inadequate remedy to an overly broad ban on constitutionally-protected speech.

E. The "Appears To Be" And "Conveys The Impression" Provisions Of The CPPA Are Unconstitutionally Vague.

Under the void-for-vagueness doctrine, laws can violate the Due Process Clause of the Fifth Amendment in two ways. First, laws violate the Due Process Clause when they do not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, thereby failing to provide fair warning to those who wish to act lawfully.[27] *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Second, laws violate the Due Process Clause when they impermissibly delegate fundamental questions of policy to police officers, judges, and juries, thereby allowing for resolution of those questions on "an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 109. The CPPA violates due process in both of these ways.

First, the CPPA fails to define basic terms and phrases necessary to give persons of ordinary intelligence a basic understanding of what is prohibited. The CPPA fails to define its highly subjective, yet key, phrases "appears to be" and "conveys the impression." *See* 18 U.S.C. § 2256(8)(B),(D). Consequently, persons are left wondering: "Appears to whom to be a minor?" "Conveys to whom the impression that a minor is depicted?" "How does a minor appear?" and "What conveys the impression that a minor is depicted?" Without any clear

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[27] In cases where First Amendment interests are at stake, laws require an even greater degree of specificity. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (when laws interfere with speech, a more stringent vagueness test applies). This is particularly true for laws purporting to regulate child pornography, which are required to adequately define the prohibited conduct and suitably limit and describe the category of forbidden sexual conduct. *Ferber*, 458 U.S. at 764.

answers to these questions, law-abiding citizens attempting to conform their conduct to the law cannot know for certain what these phrases actually mean – particularly since age, as with beauty, is in the eye of the beholder. *See American Library Ass'n v. Reno*, 33 F.3d 78, 90 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995) (recognizing the difficulty in distinguishing, based on appearances alone, whether performers are fourteen or eighteen, seventeen or twenty-one).[28]

Second, the failure to provide definitions to these key phrases gives law enforcement officials unbridled discretion in enforcing the CPPA. The undefined phrases of the CPPA permit law enforcement officials to make completely subjective judgments about whether an adult or a completely fictional character depicted in a sexually explicit work "appears to be a minor" and whether a depiction is advertised, promoted, presented, described, or distributed in such a manner that "conveys the impression" that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. Given that a United States Senator has defined "safe-sex" educational materials as obscene[29] and a federal court has classified some visual depictions of fully clothed persons as "sexually explicit,"[30] one can only imagine the types of material that law enforcement officials will find criminal under the amorphous phrases "appears to be a minor" and "conveys the impression of a minor." Undoubtedly, the CPPA's failure to

[28] Distinguishing age based on physical appearances has become even more difficult of late, given the trend of children to reach physical puberty at ever earlier ages. *See* Michael D. Lemonick, "Teens Before Their Time," *Time*, Oct. 30, 2000.

[29] Senator Jesse Helms (R-NC) asserted that written educational materials promoting "safe sex" were "obscene." 133 Cong. Rec. S14203 (daily ed., Oct. 14, 1987).

[30] *See United States v. Knox*, 32 F.3d 733, 749 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), where the court opined that the phrase "lascivious exhibition of the genitals or pubic area" does not require full or partial nudity, but can also apply to clothed persons as well.

define these phrases creates a "risk of discriminatory enforcement," which, when coupled with the severity of the criminal sanctions threatened by the Act, "raises special First Amendment concerns." *Reno*, 521 U.S. at 872 (finding that regulations of speech that threaten criminal sanctions, when coupled with the "'risk of discriminatory enforcement'" of vague regulations, "poses greater First Amendment concerns than those implicated by [ ] civil regulation[s]").

Petitioners attempt to remove the vagueness inherent in the CPPA by arguing that the "virtually indistinguishable" language taken from the general legislative findings provides the much-needed definitions for the "appears to be" and "conveys the impression" provisions left undefined by the CPPA.[31] *See* Pet. Brief 40. As discussed, *supra*, there is no valid basis for Petitioners' position that the CPPA is limited by the "virtually indistinguishable" language. Even assuming, *arguendo*, that a random phrase taken out of context from the general legislative findings of a statute can be utilized to define the text of a statute, it is not at all clear how the "virtually indistinguishable" language relied upon by Petitioners would cure the CPPA's vagueness.

By its terms, the "virtually indistinguishable" language cited by Petitioners merely narrows the category of depictions that can be banned by the CPPA from all visual depictions (which is what the text of the Act says) to "those depictions that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images." This does not even remotely address the issue of whether a person who is the subject of a depiction (whether the depiction is a painting, a cartoon, or something that is "virtually indistinguishable from [an] unretouched photographic image") "appears to be" or "conveys the impression of being" a minor.

[31] The fact that Petitioners felt the need to resort to the tactic of using the "virtually indistinguishable" language to supply some definition of the key phrases of the CPPA, in itself, illustrates that the CPPA lacks adequate language to avoid a finding of unconstitutional vagueness.

In a leap of logic, however, Petitioners lift the words "unsuspecting viewer" from this phrase, add a "reasonable man"[32] component to it, and apply the whole novel construct to the "appears to be" question. Specifically, Petitioners claim that the CPPA contains an "objective" test, which is whether "a reasonable unsuspecting viewer" would consider that a depiction "appears to be" or "conveys the impression of" a minor. Putting aside the fact that Petitioners are now wildly afield from anything in the actual language of the CPPA, even this test suffers from vagueness. Although Petitioners' argument has potentially answered the "appears to whom?" and "conveys to whom?" questions, it does not even begin to broach the questions of "how does a minor appear?" and "what conveys the impression that a minor is depicted?" For example, does a film showing sexual activity by a nineteen-year-old girl dressed in a cheerleading outfit "appear to be" a depiction of a minor? Reasonable minds will likely differ on this question.

Adding a reasonable person review to an inherently vague statute, as Petitioners have suggested doing to the CPPA, does not make the statute any less vague.[33] For example, if a statute banned all sexual depictions in movies that were "too long," and stated that the statute is to be interpreted in light of what a reasonable person would think was "too long," the statute would still be void for vagueness for its failure to provide an explicit definition of the phrase "too long." The same is true of the "appears to be" and "conveys the impression" language here. The very crux of the matter is that even reasonable people may differ on what "appears to be" a minor and what "conveys the

[32] The language relied upon by Petitioners does not require that the "unsuspecting viewer" be reasonable. *See* 18 U.S.C. § 2251 note (Supp. V 1999) (Historical & Statutory Notes).

[33] That is especially true here where the first order of business would be to determine exactly what is meant by the undefined phrase "unsuspecting viewer."

impression" that a minor is depicted.[34] Thus, the "reasonable unsuspecting viewer" language supplied by Petitioners does nothing to provide the "explicit standards" for enforcement required by the Due Process Clause. *See Grayned*, 408 U.S. at 108 (stating that in order to avoid being declared void for vagueness "laws must provide explicit standards for those who apply them"). An ordinary citizen attempting to conform his conduct to the law will be unable to discern which one of the many available "reasonable" interpretations of the CPPA's undefined phrases the judge or jury will decide to apply in his case.[35]

For these reasons, the "appears to be" and "conveys the impression" provisions of the CPPA, whether interpreted as written or as re-invented by Petitioners, are unconstitutionally vague.

[34] Further, this problem cannot be solved, as Petitioners suggest, merely by an examination of the physical characteristics of the persons depicted. *See American Library Ass'n*, 33 F.3d at 90 (recognizing the difficulty in distinguishing, based on appearances alone, whether performers are fourteen or eighteen, seventeen or twenty-one).

[35] Petitioners' reference to the CPPA's scienter requirement is, like its insertion of "reasonable unsuspecting viewer" language, inadequate to cure the vagueness of the statute and is, in fact, illogical. Saying that a conviction under the CPPA requires the defendant to "know" something that is inherently vague, and thus unknowable, such as whether a person "appears to be" a minor, is to say that there could never be a conviction under the CPPA, a result that Petitioners surely did not intend. Thus, Petitioners' argument that the CPPA cannot be considered vague because a defendant would have to know someone "appeared to be" a minor is not a credible solution to the vagueness problem.

CONCLUSION

It is abundantly clear that the CPPA's "appears to be" and "conveys the impression" provisions are unconstitutional. Accordingly, the court of appeals' judgment should be affirmed.

Respectfully submitted,

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JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

THE FREE SPEECH COALITION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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23 pp

TABLE OF CONTENTS

	Page
A. *Ferber* does not protect the covered material	2
B. The covered material has little, if any, value	3
C. The governmental interests are compelling	7
D. The CPPA is not substantially overbroad	16
E. The CPPA is not unconstitutionally vague	18
Conclusion	20

TABLE OF AUTHORITIES

Cases:

American Library Ass'n v. *Reno*, 33 F.3d 78 (D.C. Cir. 1994), cert. denied, 515 U.S. 1158 (1995)	17
Burson v. *Freeman*, 504 U.S. 191 (1992)	10, 11
FEC v. *Colorado Republican Fed. Campaign Comm.*, 121 S. Ct. 2351 (2001)	11
Giboney v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949)	13
Ginsberg v. *New York*, 390 U.S 629 (1968)	13
Hamling v. *United States*, 418 U.S. 87 (1974)	19
Hill v. *Colorado*, 530 U.S. 703 (2000)	11
Miller v. *California*, 413 U.S. 15 (1973)	2, 14, 19, 20
New York v. *Ferber*, 458 U.S. 747 (1982)	1, 2, 3, 4, 7, 11, 12, 13, 16
Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978)	11
Olmstead v. *L.C.*, 527 U.S. 581 (1999)	5
Osborne v. *Ohio*, 495 U.S. 103 (1990)	8, 13
Pope v. *Illinois*, 481 U.S. 497 (1987)	19
Regan v. *Time, Inc.*, 468 U.S. 641 (1984)	11, 12
Sutton v. *United Airlines, Inc.*, 527 U.S. 471 (1999)	5
Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997)	9
United States v. *Coleman*, 54 M.J. 869 (A.C.M.R. 2001)	9, 10
United States v. *Fox*, 248 F.3d 394 (5th Cir. 2001)	9

Cases—Continued: Page

United States v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999) 1, 4, 18
United States v. *Mento*, 231 F.3d 912 (4th Cir. 2000), petition for cert. pending, No. 00-8114 (filed Jan. 22, 2001) 3
United States v. *Petrillo*, 332 U.S. 1 (1947) 20
Winship, In re, 397 U.S. 358 (1970) 10

Constitution and statutes:

U.S. Const.:
Amend. I 1, 2, 3, 4, 10, 11, 12, 13, 14
Amend. V (Due Process Clause) 10
Child Pornography Prevention Act of 1996, 18 U.S.C. 2251 *et seq.*:
18 U.S.C. 2251 (1994 & Supp. V 1999) 9
18 U.S.C. 2251 note (Supp. V 1999) 2, 5, 12, 18-19
18 U.S.C. 2252(c) (Supp. V 1999) 17
18 U.S.C. 2252A (Supp. V 1999) 1
18 U.S.C. 2252A(c)(3) (Supp. V 1999) 4, 6
18 U.S.C. 2256(8) (Supp. V 1999) 1, 5
18 U.S.C. 2256(8)(B) (Supp. V 1999) 5
18 U.S.C. 2256(8)(D) (Supp. V 1999) 5
18 U.S.C. 2257 17

Miscellaneous:

S. Rep. No. 358, 104th Cong., 2d Sess. (1996) 4, 6, 8, 9

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

In *New York* v. *Ferber*, 458 U.S. 747 (1982), the Court held that visual depictions of live sexual performances by minors are unprotected by the First Amendment. The Court reasoned that the "evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake," that "it is permissible to consider these materials as without the protection of the First Amendment." *Id.* at 763-764. The prohibitions in the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. 2252A, 2256(8) (Supp. V 1999), apply to visual depictions of actual minors engaged in sexually explicit conduct. *United States* v. *Hilton*, 167 F.3d 61, 66 (1st Cir.), cert. denied, 528 U.S. 844 (1999). They also cover a narrow category of additional depictions—those that

Congress found to be "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5). As in *Ferber*, the "evil to be restricted" in that category of material "overwhelmingly outweighs the expressive interests, if any, at stake." 458 U.S. at 763-764. Thus, that category of material is also unprotected by the First Amendment.

A. *Ferber Does Not Protect The Covered Material*

Respondents contend (Br. 22-23) that the depictions banned by the CPPA are "exactly the type of depictions held in *Ferber* to be protected by the First Amendment." *Ferber*'s sole *holding*, however, was that the government may regulate visual depictions of actual minors engaged in sexually explicit conduct. Because the particular state statute at issue in *Ferber* applied only to such depictions, the Court had no occasion to resolve the question whether the government also may regulate material that is "virtually indistinguishable" from depictions of real minors engaged in sexually explicit conduct. Indeed, at the time of *Ferber*, the computer technology for producing such images had not yet emerged.

In support of their argument that the material covered by the CPPA is constitutionally protected under *Ferber*, respondents rely (Br. 22) on the following statement from that decision: "We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." 458 U.S. at 764-765. That statement, however, is best understood in the context of a discussion of *Miller* v. *California*, 413 U.S. 15 (1973), as referring to the protection that the First Amendment extends to such material as written works, artistic drawings,

paintings, sculptures, and cartoons, not to material that is "virtually indistinguishable" from depictions of actual children engaged in sexually explicit conduct. *United States* v. *Mento*, 231 F.3d 912, 919 n.8 (4th Cir. 2000), petition for cert. pending, No. 00-8114 (filed Jan. 22, 2001). Respondents' far broader reading ignores the Court's observation, with apparent approval, that at the time of the decision in *Ferber*, the child pornography laws of two States had defined a child as "a person under age 16 or who appears as a prepubescent," and the law of another State had defined a child as "one who is or appears to be under 16." 458 U.S. at 764 n.17. Read together, the two statements suggest the very line that Congress drew in the CPPA: It covered depictions that appear to be actual minors engaged in sexually explicit conduct, but it excluded from coverage written descriptions and artistic conceptions of minors that do not have the realism of photographs.

Respondents' focus on a single isolated statement in *Ferber* also misses the critical point of that decision—that material is categorically unprotected by the First Amendment when the government's interest in preventing the evils associated with it "overwhelmingly outweighs the expressive interests, if any, at stake." *Ferber*, 458 U.S. at 763-764. That mode of analysis, rather than any single statement in the opinion, governs the resolution of the question presented here.

B. *The Covered Material Has Little, If Any, Value*

1. Respondents argue (Br. 17-20, 29-30, 39-41) that the prohibitions in the CPPA of material that depicts conduct that "appears to be" and "conveys the impression" of "a minor engaging in sexually explicit conduct" cover a vast amount of material that has serious value. Here, as in *Ferber*, however, the value of the material that is actually covered by the prohibitions is "exceedingly modest, if not *de*

minimis." 458 U.S. at 762. It is "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." *Id.* at 762-763.

To the extent that there might be a legitimate objective in a rare case to depict minors engaged in sexually explicit conduct, it can be done consistently with the CPPA. Because the CPPA reaches only material that is "virtually indistinguishable" from photographs of actual minors engaged in sexually explicit conduct, artistic conceptions—drawings, paintings, sculptures, and cartoons—are not prohibited. In addition, by virtue of the CPPA's affirmative defense, depictions of youthful-looking adults are also permissible, as long as the creators and distributors of such material do not "advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(c)(3) (Supp. V 1999). That defense protects the use of adults in sexually explicit depictions, as long as "the material has not been pandered as child pornography." S. Rep. No. 358, 104th Cong., 2d Sess. 10 (1996).

Because the CPPA does not cover artistic conceptions of minors engaged in sexually explicit conduct or depictions of adults engaged in sexually explicit conduct that are not pandered as child pornography, its prohibitions do not facially trigger serious First Amendment concerns. The material that is subject to prosecution under the "appears to be" and the "conveys the impression" prohibitions consists largely of realistic, sexually explicit images of pre-pubescent minors or of persons who otherwise clearly appear to be under the age of 18. *Hilton*, 167 F.3d at 73. Such material is catered to pedophiles, and has little or no serious value. *Ibid.*

2. In an effort to avoid the conclusion that the CPPA covers material that has little or no value, respondents interpret the Act to encompass a far broader range of materials. In particular, respondents contend (Br. 17-20) that the CPPA is not limited to visual depictions that are virtually indistinguishable from photographs of real children, but also covers drawings, paintings, sculptures, and cartoons. Respondents base that interpretation on the CPPA's coverage of "any visual depiction * * * whether made or produced by electronic, mechanical, or other means." 18 U.S.C. 2256(8) (Supp. V 1999). But in order to be subject to the prohibitions at issue, a visual depiction, however made or produced, must "*appear[] to be*" of a "*minor* engaging in sexually explicit conduct," or must be pandered "in such a manner that *conveys the impression* that the material is or contains a visual depiction of a *minor* engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(B) and (D) (Supp. V 1999) (emphasis added). In legislative findings, Congress clarified that a depiction falls within those definitions only if it is "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5); see also 18 U.S.C. 2251 note (Supp. V 1999) (Findings 8, 9, 13).

Respondents argue (Br. 19) that the statutory findings have no relevance in interpreting the CPPA's prohibitions. This Court, however, has expressly relied on statutory findings to determine the meaning of the substantive provisions of an Act of Congress. *Olmstead* v. *L.C.*, 527 U.S. 581, 600 (1999); *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 484-487 (1999). Moreover, the background of the CPPA supports the same interpretation. Before enactment of the CPPA, Congress regulated only depictions of *actual* minors engaged in sexually explicit conduct. Against that background, the phrase "appears to be[]" of a "minor engaging in sexually

explicit conduct" necessarily refers to realistic depictions that appear to use actual minors in their production. The Senate Report specifically explains that the new prohibitions apply "to the same type of photographic images *already* prohibited, but which does not require the use of an actual minor in its production." S. Rep. No. 358, *supra*, at 21.

3. Respondents also contend (Br. 29-30) that the Act prohibits non-obscene depictions of youthful-looking adults engaged in sexually explicit conduct. The Act's affirmative defense, however, expressly permits the creation of such depictions, provided they are not pandered to convey the impression that actual minors were used in their production. 18 U.S.C. 2252A(c)(3) (Supp. V 1999). Respondents' dire predictions (Br. 29-30) about the effect of the CPPA on movies ignores the affirmative defense. By virtue of the defense, film makers may use adults as actors and body doubles in non-obscene movies that depict teen sexual activity, as long as they refrain from pandering the movies to convey the impression that the *actors* used in the sexually explicit scenes are, in fact, minors. Similarly, films may be promoted as works about teen sexual activity, as long as they are not promoted to convey the impression that the *actors* involved in the sexually explicit scenes are minors.

Respondents apparently assume (Br. 29-30) that including a scene in a movie in which an underage *character* engages sexually explicit conduct itself constitutes impermissible pandering. A reasonable viewer of movies, however, is aware that adults are often used to portray minors and to act as body doubles in films about teen sexuality. Thus, the creation of a scene in which an underage character engages in sexually explicit conduct does not in itself constitute impermissible pandering. For the same reason, promoting a film as one about teen sexuality does not constitute impermissible pandering. Film makers and distributors lose the affirmative defense only if they affirmatively convey the

impression that the *actor* in a sexually explicit scene is a minor.[1]

C. *The Governmental Interests Are Compelling*

Respondents contend (Br. 25) that the governmental interests supporting the "appears to be" and "conveys the impression" prohibitions do not rise to the same level as the interest at stake in *Ferber*. The CPPA, however, is supported by the same interest supporting the state law upheld in *Ferber*, and the other interests supporting the CPPA are just as compelling.

1. One compelling interest supporting the "appears to be" and "conveys the impression" prohibitions is precisely the same interest involved in *Ferber*—preventing the use of actual minors in sexually explicit depictions by shutting down the market for such depictions. 458 U.S. at 758-759. Because it is possible to produce computer images that are virtually indistinguishable from photographs of real minors engaged in sexually explicit conduct, a defendant charged with distributing or possessing depictions of real minors engaged in sexually explicit conduct can argue that the images may, in fact, be computer-generated. The government can refute that argument if it happens to be able to match the

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[1] It is not necessary to decide whether any of the movies cited by respondents (Br. 30, 44) would fall within the reach of the CPPA but for the affirmative defense. Those movies are not in the record and no evidence has been elicited about them. The question whether any particular movie would be covered by the CPPA absent the affirmative defense would depend on whether any scenes in the movies *depict* sexually explicit conduct as opposed to creating an understanding that sexually explicit conduct is occurring, and on whether any of the actors or actresses in sexually explicit scenes appear (beyond a reasonable doubt) to be minors, rather than adults portraying minors. While respondents represent that all the movies would be covered, they have failed to identify any scenes in which sexually explicit conduct, as defined in the CPPA, is depicted or any actors who appear to be minors.

depictions to pictures in pornographic magazines produced before the development of computer imaging software or if it can establish the identity of the victim. But in the many cases in which it is not possible to do one of those two things, the defendant has a built-in reasonable doubt argument that could thwart prosecutions. The "appears to be" and "conveys the impression" prohibitions close that loophole and ensure that those who distribute and possess depictions of real minors engaged in sexually explicit conduct will not escape prosecution and punishment. See S. Rep. No. 358, *supra*, at 16-17, 20.

Respondents argue (Br. 25) that, under *Ferber*, that rationale would be sufficient only if the government could establish that "the production of materials using actual children cannot be stopped without also banning the materials covered by the CPPA." Respondents further argue that the government failed to make such a showing. Respondents' argument cannot be reconciled with *Osborne* v. *Ohio*, 495 U.S. 103 (1990), or with the record before Congress.

In *Osborne*, the Court upheld the constitutionality of a prohibition against the possession of depictions of actual minors engaged in sexually explicit conduct. The Court did not apply the rule of absolute necessity proposed by respondents. Instead, it held that it was "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." *Id.* at 109-110. Despite its obvious relevance, respondents avoid any reference to *Osborne* anywhere in their brief. In any event, Congress's findings that new computer technology could make it "almost impossible" for the government to prove its case, and could render the existing prohibitions "unenforceable," S. Rep. No. 358, *supra*, at 20, satisfy respondents' more demanding standard.

Respondents assert (Br. 37) that Congress's assessment of the problem was inadequate because Congress failed to identify any cases in which a child pornographer escaped conviction because the government failed to satisfy its burden of proof. But Congress need not await catastrophic consequences before legislating; to avert serious harms, Congress may rely on reasonable predictive judgments. *Turner Broad. Sys. Inc.* v. *FCC*, 520 U.S. 180, 195 (1997). Congress learned that defendants in a leading prosecution had asserted that the government must refute the possibility that the images they possessed were created using computer technology rather than real minors. S. Rep. No. 358, *supra*, at 17. Congress also learned that the government was able to refute the defense in that case by matching the depictions to pornographic magazines that predated the existence of computer imaging software, but that magazine archives will have increasingly less value since child pornography produced today post-dates the arrival of such software. *Ibid.* Congress therefore had a strong basis for concluding that the very existence of sexual explicit images that are virtually indistinguishable from photographs of real minors engaged in sexually explicit conduct would pose a serious danger to future prosecutions involving recently created child pornography.

Recent experience bears out Congress's judgment. In *United States* v. *Fox*, 248 F.3d 394, 403 (5th Cir. 2001), the government's computer expert admitted on cross-examination that there was no way to determine whether the individuals depicted even exist. That concession did not hinder the prosecution because the defendant was charged under the "appears to be" prohibition. In *United States* v. *Coleman*, 54 M.J. 869 (A.C.M.R. 2001), the court upheld a guilty plea to possession of sexually explicit depictions involving real minors, in violation of 18 U.S.C. 2251 (1994 & Supp. V 1999), because the defendant admitted that he possessed

such images. The court cautioned, however, that "[h]ad appellant pled not guilty and presented evidence that the images were computer-generated, the government may have had difficulty proving that real children were depicted in these images." 54 M.J. at 873.

Respondents argue (Br. 37-38) that, if Congress wanted to restrict a particular reasonable doubt defense that could endanger prosecutions, it should have focused its efforts on that defense. But by prohibiting distribution and possession of depictions that "appear to be" or that "convey the impression" that minors are engaged in sexually explicit conduct, Congress effectively eliminated the problematic defense. Respondents offer no alternative, much less one that could have accomplished Congress's goal as effectively.

Respondents argue (Br. 38) that eliminating the government's burden to prove that depictions involve real children violates the Due Process Clause, because it relieves the government of the burden of proving an essential element of the offense. But the new prohibitions establish new offenses with different elements, and the Due Process Clause simply requires the government to prove beyond a reasonable doubt each element of the new offenses. *In re Winship*, 397 U.S. 358, 364 (1970). Since the involvement of real minors in the depiction is not an element of the new offenses, the Due Process Clause does not require the government to prove it.

Respondents similarly err (Br. 38) in contending that relieving the government of the burden of proving that images are of real children violates the First Amendment. In response to evidence that there is a serious danger that harmful conduct will otherwise escape detection and prosecution, Congress may adopt stricter prohibitions that minimize that risk. For example, in *Burson* v. *Freeman*, 504 U.S. 191 (1992), the Court upheld a state statute that prohibited the solicitation of votes near a polling place in order to guard against voter interference. The Court rejected the argu-

ment that the First Amendment required the State to pursue its interest in preventing interference through a direct prohibition against such conduct, reasoning that "because law enforcement officers generally are barred from the vicinity of the polls * * *, many acts of interference would go undetected." *Id.* at 207.

In *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the Court upheld the constitutionality of a rule prohibiting a lawyer from soliciting a client in person based on the potential for overreaching by the lawyer. The Court concluded that the First Amendment did not require the government to prove overreaching in each case, because "in-person solicitation is not visible or otherwise open to public scrutiny," and "[o]ften there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place." *Id.* at 466

Similarly, in *Ferber*, the Court upheld the application of New York's child pornography law to material produced outside the State in part because "[i]t is often impossible to determine where such material is produced." 458 U.S. at 765-766 & n.19; see also *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 121 S. Ct. 2351, 2366-2370 (2001) (upholding constitutionality of limits on coordinated expenditures because they minimize the danger that impermissible contributions can be disguised as coordinated expenditures and because directly combating circumvention is difficult as a practical matter); *Hill* v. *Colorado*, 530 U.S. 703, 729 (2000) (upholding constitutionality of a state statute that prohibited all close approaches of another person near a health care facility, not just physically harassing ones, on the ground that "individualized characterization of each individual movement is often difficult to make accurately"); *Regan* v. *Time, Inc.*, 468 U.S. 641, 656-659 (1984) (upholding constitutionality of federal statute that makes it unlawful to publish an image of

the dollar bill unless it is in black and white and 3/4 or 1 1/2 times the size of the bill itself without requiring proof that the image could be used to facilitate counterfeiting); *id.* at 700-704 (Stevens, J., concurring in the judgment in part and dissenting in part).

The principle involved in those cases is controlling here. In order to combat the danger that those who possess and distribute depictions of actual children engaged in sexually explicit conduct will escape detection and prosecution, Congress could constitutionally prohibit the possession and distribution of virtually indistinguishable depictions.

2. The "appears to be" and "conveys the impression" prohibitions are also supported by a second compelling interest—protecting children from becoming victims of abuse by pedophiles. Pedophiles use child pornography to seduce minors into sexual activity, and material that is virtually indistinguishable from depictions involving real children can be as effective in seducing children into sexual activity as depictions of real minors. 18 U.S.C. 2251 note (Supp. V 1999) (Finding 3). The government's interest in protecting minors against such abuse is just as compelling as the government's interest in preventing minors from being used in the production of child pornography. *Ferber*, 458 U.S. at 757 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

Respondents contend (Br. 33) that the First Amendment forbids Congress from relying on a theory that child pornography conveys a message that affects the thoughts and feelings of children. Congress, however, was not concerned with the thoughts and feelings of children as such. Instead, its concern was that pedophiles commonly use child pornography to subject minors to sexual abuse. Congress regarded the material covered by the CPPA as a tool of the crime

of child abuse much like burglars' tools are instruments of the crime of burglary.

That basis for the CPPA is fully consistent with the First Amendment. There is no First Amendment right to show minors the kind of sexual explicit material covered by the CPPA. *Ginsberg* v. *New York*, 390 U.S. 629, 638-641 (1968). Nor does the First Amendment protect the use of speech or writings to commit a crime. *Ferber*, 458 U.S. at 762 (relying on *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Significantly, in upholding a state prohibition against the possession of child pornography, the Court in *Osborne* relied in part on the State's interest in preventing pedophiles from using child pornography to seduce children into sexual activity. 495 U.S. at 111.

Respondents make no effort to explain why the principles involved in *Ginsberg* and *Giboney* and the decision in *Osborne* do not justify Congress's decision to ban the materials covered by the CPPA in order to prevent them from being used to abuse children sexually. Instead, respondents rely on cases (Br. 33) holding that adults cannot be limited to material that is suitable for children and that regulation of speech based on listener reaction is generally disfavored. None of those cases addresses the constitutionality of regulating visual depictions having little or no value based on evidence that they are used as tools for the abuse of children. *Osborne* does address that issue, and it makes clear that it is legitimate for the government to rely in part on that justification to support a prohibition against the possession of child pornography.

Respondents argue (Br. 32) that there is insufficient evidence that material covered by the CPPA has been used to seduce children into sexual activity. The "appears to be" and "conveys the impression" prohibitions, however, cover depictions involving actual minors, and Congress had abundant evidence that such depictions have been used to seduce

children into sexual activity. Gov't Br. 33-37. Moreover, Congress could rely on common sense to conclude that depictions that are virtually indistinguishable from depictions of actual minors children engaged in sexually explicit conduct pose the same danger. Congress also heard expert testimony confirming that common-sense judgment. Gov't Br. 36.

Congress's tool-of-abuse rationale would not justify banning all non-obscene depictions of adults engaged in sexually explicit conduct simply because they too are often used to seduce children. Resp. Br. 25. That category of depictions includes a significant amount of material that has serious value and that does not violate community standards of decency. *Miller*, 413 U.S. at 23. In contrast, the material at issue here has little or no value and almost uniformly violates community standards of decency.

Respondents argue (Br. 34) that the First Amendment requires Congress to vindicate its compelling interest by relying entirely on laws that prohibit sexual abuse. That solution ignores the realities of the situation. The process of seduction takes place in secret, and its victims rarely seek help before it is too late. A prohibition against sexual abuse is therefore inadequate to protect minors from being abused by pedophiles. In order to better protect children from such dangers, it is also necessary to remove from the hands of pedophiles a common tool of abuse.

3. The government's compelling interests are furthered by the CPPA's prohibitions in two additional ways. First, because child pornography is used as a form of currency to purchase additional child pornography, banning the material covered by the CPPA helps to stamp out the market for sexually explicit depictions of actual minors. Second, because pedophiles use child pornography as a mechanism to whet their appetite for sexual abuse, the CPPA's prohibitions further the government's compelling interest in protecting children from such abuse.

a. Respondents argue (Br. 35) that a prohibition against trading material covered by the CPPA for other child pornography would be a more narrowly tailored way to address Congress's concern that material covered by the CPPA fuels the child pornography market. Prohibiting such material from being distributed and possessed, however, is a far more effective solution. If it is not distributed or possessed, there is no risk that it will be exchanged.

Reliance on that rationale also does not lead to the conclusion that non-obscene depictions of adults engaged in sexual explicit conduct could also be banned. Resp. Br. 36. There is no evidence that non-obscene adult material is part of the same market. Moreover, as previously discussed, unlike the material at issue here, much non-obscene adult material has serious value and does not violate community standards of decency.

b. Respondents argue (Br. 33) that the whetting-the-appetite rationale conflicts with cases holding that regulation of speech based on the effect on the viewer is generally disfavored. But that general principle has no application here. Because the depictions have little or no value, the crime is secretive in nature, and the victims lack both the physical ability and maturity in judgment to protect themselves from their abusers, Congress may remove from pedophiles a preferred mechanism for stimulating their appetites for abuse. See also Gov't Br. 31-32.[2]

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[2] Respondents' challenge (Br. 32-36) to the factual predicate for the single-market and whetting-the appetite rationales is also unfounded. There was ample evidence that pedophiles exchange depictions of actual minors engaged in sexually explicit conduct and use such depictions to whet their appetites for sexual abuse. Gov't Br. 38-39. Since the material covered by the CPPA is "virtually indistinguishable" from such material, Congress logically concluded that it posed the same dangers.

D. *The CPPA Is Not Substantially Overbroad*

Respondents contend (Br. 39-45) that the "appears to be" and "conveys the impression" prohibitions are substantially overbroad. But the material covered by those prohibitions consists largely of sexually explicit images of pre-pubescent children or persons who otherwise clearly appear to be under the age of 18. See p. 4, *supra*. Such depictions have little or no value, except to pedophiles, and the government's compelling interests in eliminating their availability overwhelmingly outweighs whatever slight value they may have. The CPPA is therefore not substantially overbroad, and whatever overbreadth may exist may be avoided through case-by-case adjudication. *Ferber*, 458 U.S. at 773-774.

In support of their claim of substantial overbreadth, respondents assert (Br. 39-46) that the "appears to be" and "conveys the impression" prohibitions apply to artistic conceptions of minors in sexual poses, and that the affirmative defense provides inadequate protection. We have already addressed respondents' mistaken view that the CPPA applies to artistic conceptions of minors in sexual poses. We therefore turn to respondents' criticisms of the affirmative defense.

Respondents argue (Br. 42-43) that the affirmative defense is inadequate to protect artists like Jim Gingerich who paint images that come entirely from their minds. Such images, however, are quite unlikely to be virtually indistinguishable from photographs of actual children engaged in sexually explicit conduct. Unless they are, they are not covered by the CPPA in the first place.

Respondents further contend (Br. 43) that the affirmative defense is inadequate to protect persons who are not involved in the production of material because they have no way of knowing whether adults have been used in the production. If the image appears to be a prepubescent minor, or

otherwise clearly appears to be someone under the age of 18, however, there is no such difficulty. In a borderline case, those not involved in the production of the material can check with those who are. Federal law requires the producers of sexually explicit material to create and maintain records of the performers' names and ages, and to attach a statement to such material stating where the records may be found. 18 U.S.C. 2257; see *American Library Ass'n* v. *Reno*, 33 F.3d 78 (D.C. Cir. 1994), cert. denied, 515 U.S. 1158 (1995). If such information is not available, however, rather than running the risk that they will be helping to sustain the child pornography market, persons may simply refrain from distributing or possessing the material.

Respondents argue (Br. 44) that the affirmative defense is inadequate to protect respondents Bold Type Inc., Jim Gingerich, and Ron Raffaelli, because they "possess" the depictions they create and sell, and the affirmative defense does not apply to unlawful possession. Respondents' concern is misguided. The affirmative defense applies to any person who transports, receives, distributes, reproduces for distribution, sells, or possesses with the intent to sell material that might otherwise be covered by the Act. 18 U.S.C. 2252(c) (Supp. V 1999) (affirmative offense applies to persons charged with violating paragraphs (1), (2), (3), or (4)). Respondents each engage in at least one of those activities, and the affirmative defense necessarily applies to the possession of such material incident to engaging in one of those activities. Because possession is an invariable concomitant of those activities, any other interpretation would deprive the defense of any real meaning.[3]

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[3] Because respondents are all engaged in activities as to which the affirmative defense applies, there is no need to decide whether the Constitution requires a similar defense for persons whose possession of adult material is not incident to one of those activities. For the same reason, it

E. *The CPPA Is Not Unconstitutionally Vague*

Finally, respondents err in contending (Br. 45-49) that the "appears to be" and "conveys the impression" prohibitions are unconstitutionally vague. The CPPA's standard for determining coverage is whether a reasonable unsuspecting viewer would consider the depiction to be virtually indistinguishable from a photograph of an actual individual under the age of 18 engaged in sexually explicit conduct. *Hilton*, 167 F.3d at 75; 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5). That standard provides adequate guidance to those who must comply with the law, to law enforcement officers, and to juries.

Respondents contend (Br. 47) that it is inappropriate to derive the applicable standard from congressional findings rather than from the statute itself. But the congressional findings are part of the statute itself. Moreover, the congressional findings simply clarify the meaning of the prohibitions, and it is entirely appropriate to interpret a statute in light of statutory findings. See p. 5, *supra*. Respondents' further assertion (Br. 48) that the "reasonable person" component of the standard has no nexus to the statutory text is incorrect. When Congress referred to the "unsuspecting viewer," 18 U.S.C. 2251 note (Supp. V 1999)

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is not necessary to decide whether possessors who can satisfy the terms of the affirmative defense have the mens rea required for conviction. *Hilton*, 167 F.3d at 75-76. Similarly, because none of the respondents claims to be a creator of computer-generated fictional images that are virtually indistinguishable from photographs of real children engaged in sexually explicit conduct, there is no need to decide whether the Constitution requires some kind of defense for such depictions. The resolution of that question would be particularly premature because respondents have not identified a single example of an entirely fictional computer-generated image (as opposed to one that is morphed from a real minor in an innocent pose) that would satisfy the virtually indistinguishable standard.

(Finding 5), it plainly meant a "reasonable" unsuspecting viewer, not an "unreasonable" one.

Respondents argue (Br. 48) that the standard is still unconstitutionally vague because reasonable persons may disagree about whether the standard is satisfied in particular cases. This Court's obscenity decisions refute that contention. Under those decisions, two of the three prongs of the inquiry—appeal to the prurient interest and patent offensiveness—are decided from the perspective of the "average person, applying contemporary community standards." *Miller*, 413 U.S. at 24, 30. The third inquiry—serious value— is decided from the perspective of a "reasonable person." *Pope* v. *Illinois*, 481 U.S. 497, 501 (1987). In *Miller*, the Court held that its three-part test for determining obscenity is not unconstitutionally vague, explaining that "these specific prerequisites will provide fair notice to a dealer in [obscene] materials that his public and commercial activities may bring prosecution." 413 U.S. at 27. The Court added that "[t]he mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." *Id.* at 26 n.9; see also *Hamling* v. *United States*, 418 U.S. 87, 104-105 (1974) ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination [on the first two prongs], just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.").

In any event, the reasonable person test for determining whether material is covered by the CPPA is unlikely to lead to disagreement in the vast majority of cases. Reasonable persons can easily come to a consensus when the image has the characteristics of a prepubescent minor or when the image otherwise clearly appears to be a minor. "That there may be marginal cases in which it is difficult to determine

the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *Miller*, 413 U.S. at 28 n.10 (quoting *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947)).

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For the foregoing reasons and the reasons stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

AUGUST 2001

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CLERK

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,

Petitioners,

—v.—

FREE SPEECH COALITION, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONERS

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28 pp

No. 00-795

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, *ET AL.*, *Petitioners*,

V.

FREE SPEECH COALITION, *ET AL.*, *Respondents*.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amicus curiae, Morality in Media, Inc., hereby moves this Honorable Court, pursuant to Supreme Court Rule 37(b), for an order granting leave to file the attached Brief *Amicus Curiae* in support of the Petitioners. Consent was granted by Petitioners and withheld by Respondents.

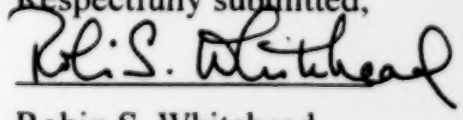
Morality in Media, Inc. ("MIM") is a New York non-profit, interfaith, charitable corporation founded in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. MIM also focuses on legal and law enforcement issues related to child pornography and material harmful to minors. Due to the rapid increase in the use of the Internet for purposes of distributing child pornography and obscenity, MIM has expanded its focus to include the legal issues concerning this new form of communication.

MIM has a special interest in the subject matter of this appeal, since our legal and public policy advocates are frequently sought out by federal and state legislators for assistance and advice on efforts to protect children from exploitation and material that is harmful to them. MIM has filed several friend of the court briefs to this Honorable Court including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); and *City News and Novelty, Inc. v. City of Waukesha*, ___ U.S. ___ (2001).

Counsel for *amicus*, Robin S. Whitehead, provides legal assistance to prosecutors, police, public officials, legislators, community and civic leaders, and citizens on issues of obscenity, child pornography, material harmful to minors, public indecency, obscene and indecent broadcasting and the regulation of sexually oriented businesses. Ms. Whitehead has lectured at seminars, conferences and has provided workshops to citizen groups and pro-family organizations nationwide relative to the above areas of law.

For the foregoing reasons, *amicus* respectfully requests that this Court grant its Motion for Leave to File a Brief as *Amicus Curiae*.

Respectfully submitted,



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IN SUPPORT OF PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. VIRTUAL CHILD PORNOGRAPHY DESERVES NO PROTECTION UNDER THE FIRST AMENDMENT 5

A. VIRTUAL CHILD PORNOGRAPHY HAS LITTLE OR NO SOCIAL VALUE 6

B. CONGRESS'S INTERESTS IN BANNING ACTUAL CHILD PORNOGRAPHY ARE NOT LIMITED TO PROTECTING THE SUBJECTS. 8

C. CONGRESS'S COMPELLING INTERESTS IN BANNING VIRTUAL CHILD PORNOGRAPHY 11

1. SEDUCTION PURPOSES 11
2. PREVENTION OF PEDOPHILES FROM EVADING PROSECUTION 12
3. DESTRUCTION OF THE CHILD PORNOGRAPHY MARKET 15

D. BALANCE OF CONGRESS'S INTERESTS VERSUS ANY FIRST AMENDMENT INTEREST 16

II. NEW TECHNOLOGIES PROVIDING THE ABILITY TO CREATE VIRTUAL CHILD PORNOGRAPHY MAY REQUIRE INNOVATIVE JUDICIAL STANDARDS 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Beauharnais v. Illinois, 343 U.S. 250 (1952) 5

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 5

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 18, 19, 20

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 6, 19

Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999) ..... 3, *passim*

Free Speech Coalition v. Reno, No. C 97-0281 VSC, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997) 3

Ginsberg v. New York, 390 U.S. 629 (1968) 6

New York v. Ferber, 458 U.S. 747 (1982) ..... 5, *passim*

Osborne v. Ohio, 495 U.S. 103 (1990) ..... 5, *passim*

Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973) 12

Prince v. Massachusetts, 321 U.S. 158 (1944) 5

Roth v. United States, 354 U.S. 476 (1957) 5

Stanley v. Georgia, 394 U.S. 557 (1969) 7

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) 17

United States v. Acheson, 195 F.3d 645 (11th Cir. 1999) 3, 6, 11

United States v. Bausch, 140 F.3d 739 (8th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999) 6

United States, v. Coleman, ARMY No. 9801240, 2001 CCA LEXIS 3, ___M.J.___ (A.Ct.Crim.App. 2001) 13, 14

United States v. Fox, 74 F.Supp.2d 696 (E.D. Texas 1999) ... 3

United States v. Hilton, 167 F.3d 61 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 115 (1999) 3, 6, 10

United States v. James, 53 M.J. 612 (N.M.Ct.Crim.App. 2000), *petition granted*, 2000 CAAF LEXIS, No. 00-0592/NA (Nov. 16, 2000) 14

United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995) 13

United States v. Knox, 32 F.3d 733 (3rd Cir. 1994) 6

United States v. Matthews, 209 F.3d 338 (4th Cir. 2000) 6

United States v. Mento, 231 F.3d 912 (4th Cir. 2000) 3, 14

United States v. Nolan, 818 F.2d 1015 (1st Cir. 1987) 14

United States v. Pearl, 89 F.Supp.2d 1237 (D. Utah 2000) 3, 6, 17

STATUTES

The Child Pornography Prevention Act of 1966, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("CPPA") ..... 3, *passim*

18 U.S.C. § 2251 ..... 3, *passim*

18 U.S.C. § 2252 ..... 3, *passim*

18 U.S.C. § 2252A ..... 3, *passim*

18 U.S.C. § 2256 (8) ..... 3, *passim*

OTHER AUTHORITIES

CONGRESSIONAL FINDINGS FOR PUB. L. 104-208, *SEE* ANNOTATIONS FOLLOWING 18 U.S.C. § 2251 ..... 7, 11, 17

CHILD PORNOGRAPHY PREVENTION ACT OF 1995: HEARING BEFORE THE SENATE COMM. ON THE JUDICIARY. 104TH CONG., 2D SESS. 1996 ..... 11, 13

S. REP. NO. 358, 104TH CONG., 2D SESS. 1996 ..... 8, 16

FINAL REPORT, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, 1986 11

INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc. ("MIM") as *amicus curiae*,[1] files this brief in support of the Petitioners in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. *Amicus* informs the Court that consent was granted by Petitioners and withheld by Respondents, therefore your *amicus* has submitted a Motion for Leave to File this Brief *Amicus Curiae*.[2]

MIM is a New York, non-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

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[1] This Brief *Amicus Curiae* was authored in whole by Counsel of Record Robin S. Whitehead of Morality in Media, Inc. and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus* made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

[2] A copy of Petitioners' consent, sent by Barbara D. Underwood, Acting Solicitor General, and a copy of Respondents' denial of consent, sent by H. Louis Sirkin, Esq., are being filed concurrently with this brief.

MIM has an interest in this case because it is frequently asked by federal and state law enforcement agencies, legislators, and private citizens for advice and guidance on methods to enforce and improve existing laws concerning the regulation of child pornography and exploitation, and child sexual abuse. MIM recognizes this case to be a major precedent in regulating the production, distribution and possession of both actual or authentic and virtual or realistic child pornography.

MIM has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803, 120 S.Ct. 1878 (2000); and *City News and Novelty, Inc. v. City of Waukesha*, ___ U.S. ___ (2001).

Amicus is filing this brief in support of the Petitioners because we believe our brief contains relevant matter and alternative arguments that should be heard and may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

Advances in computer imaging technology have provided child pornographers the ability to create child pornography without using real children. Because these computer-generated images are virtually indistinguishable from child pornography using real children, federal child pornography laws have become ineffective for two reasons. First, since real children are no longer needed, these computer-generated pornographic materials are outside the reach of the "old" federal child exploitation laws, 18 U.S.C. §§ 2251, 2252. Second, where real children are still used, image-altering software can transform sexually explicit material in such a manner making it impossible for prosecutors to either identify the persons in the material or to prove that real children were used in producing the material.

To close these loopholes, Congress enacted 18 U.S.C. § 2252A and added the definition of "child pornography" in Section 2256(8), as part of the Child Pornography Prevention Act of 1996 ("CPPA"). In *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), the Court of Appeals held unconstitutional the definition of child pornography and other related provisions found in the CPPA, reasoning that Congress may only prohibit child pornography where actual children are used to produce the pornographic materials, but that Congress may not constitutionally proscribe virtual child pornography. *Id.* at 1092-1097. The Ninth Circuit's decision created a split in authority with the First, Fourth and Eleventh Circuits along with other federal district courts. *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 115 (1999); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States v. Pearl*, 89 F.Supp.2d 1237 (D. Utah 2000); *United States v. Fox*, 74 F.Supp.2d 696 (E.D. Texas 1999); *Free Speech Coalition v. Reno*, No. C 97-0281 VSC, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997).

Amicus argues that the Ninth Circuit's holding in *Free Speech* is contrary to case law precedent and detailed congressional findings which indicate that the CPPA's prohibition of computer-generated child pornography is constitutionally permissible. Specifically, *amicus* urges this Court to hold that 18 U.S.C. § 2252A is a category of unprotected expression, since very limited, if any, First Amendment interest exists in the conduct of viewing or distributing virtual child pornography, while Congress, on the other hand, has enumerated compelling interests in banning such materials.

ARGUMENT

I. VIRTUAL CHILD PORNOGRAPHY DESERVES NO PROTECTION UNDER THE FIRST AMENDMENT

Computer-generated child pornography, which is indistinguishable from photographs of real children, should not enjoy First Amendment protection. This Court has found certain types of activities to be outside the protection of the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (intentionally uttering fighting words); *Beauharnais v. Illinois*, 343 U.S. 250, 252 (1952) (recklessly publishing a libel); *Roth v. United States*, 354 U.S. 476, 486 (1957) (knowingly distributing obscenity); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (knowingly distributing child pornography), and *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (knowingly possessing child pornography).

The *Free Speech* Court below also erred in applying strict scrutiny analysis and instead should have applied a balancing approach, as this Court did in *New York v. Ferber*, 458 U.S. at 756, and *Osborne v. Ohio*, 495 U.S. at 108-14. Further, the Ninth Circuit was incorrect to hold that Congress did not have a compelling reason for enacting the CPPA. The issue before this Court is what weight will be afforded the social value of such material, and the act of distributing it, versus the government's interests in prohibiting the interstate traffic in real or counterfeit child pornography.

This Court has sustained statutes aimed at protecting the physical and psychological well-being of children, "even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber*, 458 U.S. at 757, citing *Prince v. Massachusetts*, 321 U.S. 158 (1944) (statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First

Amendment activity); *Ginsberg v. New York*, 390 U.S. 629 (1968) (New York law protecting children from exposure to non obscene literature held constitutional); and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children).

Moreover, this Court and other courts have recognized that legislatures are "entitled to greater leeway in the regulation of pornographic depictions of children." *Ferber*, 458 U.S. at 756; *United States v. Knox*, 32 F.3d 733, 752 (3rd Cir. 1994); *United States v. Acheson*, 195 F.3d 645, 650 (11th Cir. 1999); *United States v. Matthews*, 209 F.3d 338, 343 (4th Cir. 2000); and *United States v. Pearl*, 89 F.Supp.2d 1237, 1240 (D. Utah 2000).

A. Virtual Child Pornography has Little or No Social Value

The Ninth Circuit did not consider that both real and virtual child pornography have no "redeeming" social value. In *Ferber*, the Supreme Court, holding that child pornography is outside the protection of the First Amendment, found that the value of child pornography "is exceedingly modest, if not *de minimis*." 458 U.S. 747, 762 (1982). *See also*, *Osborne*, 495 U.S. at 108; *United States v. Bausch*, 140 F.3d 739, 742 (8th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999); *United States v. Hilton*, 167 F.3d 61, 70 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 115 (1999); and *United States v. Matthews*, 209 F.3d 338, 343 (4th Cir. 2000).

Focusing on this argument in *Osborne*, this Court expanded the proscriptions on child pornography and allowed states to ban private possession of child pornography. *Osborne*, *supra*. In doing so, the Court made a

distinction between adult pornography and child pornography, recognizing that the state's interests in *Osborne* were more important or compelling than those presented in *Stanley v. Georgia*, 394 U.S. 557 (1969). As stated in *Osborne*, 495 U.S. at 108:

> But assuming, for the sake of argument, that Osborne has a First Amendment interest in viewing and possessing child pornography, we nonetheless find this case distinct from *Stanley* because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*.

Virtual child pornography, in terms of its social value, should be treated the same as real child pornography. As articulated by the dissent below, 198 F.3d at 1100-01, both real and counterfeit child pornography contain depictions that look like real children engaging in sexually explicit activity. Because of this reason, virtual or realistic child pornography, like actual or authentic child pornography, is of "slight social value" and constitutes "no essential part of the exposition of ideas." That the only difference between real child pornography and virtual child pornography is that the former uses actual children in its production, whereas the latter may not, "does not somehow transform virtual child pornography into meaningful speech." (Ferguson, J., dissenting).

Since § 2252A only proscribes activities with "child pornography" as defined in § 2256 (8) that is or appears to the viewer, adult or child, to be images of real children engaging in sex or whose genitals are lasciviously exhibited, what is proscribed under § 2252A must look exactly like what is proscribed under § 2252 as if it were produced in violation of § 2251. This is the clear legislative intent of Congress. *See* Congressional Findings for Pub. L. 104-

208, *SEE* ANNOTATIONS FOLLOWING 18 U.S.C. § 2251 and S. REP. NO. 358, 104TH CONG., 2D SESS. 1996.

Agreeing with the dissent in *Free Speech*, *Amicus* asserts that the majority below misread *Ferber* and *Osborne* when they applied strict scrutiny. Justice Ferguson noted that the *Ferber* Court, when categorizing child pornography, held that "the balance of competing interests [was] clearly struck and that it [was] permissible to consider these materials as without the protection of the First Amendment." *Free Speech*, 198 F.3d at 1101 (Ferguson, J., dissenting) (quoting *Ferber*, 458 U.S. at 764). Also, in upholding Ohio's child pornography statute, the *Osborne* Court found that the "'gravity of the State's interests' outweighed [the defendant's] limited First Amendment right to possess child pornography." *Free Speech*, 198 F.3d at 1101 (Ferguson, J., dissenting) (quoting *Osborne*, 495 U.S. at 111).

These cases provide support for the argument that a balancing approach is the proper standard of judicial review for laws prohibiting child pornography. Following *Ferber* and *Osborne*, one finds that Congress had compelling justifications for proscribing virtual child pornography that clearly outweigh the *de minimis* value of such pornographic material.

B. CONGRESS'S INTERESTS IN BANNING ACTUAL CHILD PORNOGRAPHY ARE NOT LIMITED TO PROTECTING THE SUBJECTS

Opponents of the CPPA argue that the *Ferber* Court focused entirely on New York's compelling interest in protecting children who were sexually exploited through the creation of child pornography and that no such interest exists where real children are not used in the pornography's production. *Ferber*, 458 U.S. at 756-57. In fact, these

opponents cite *Ferber* as support that prohibitions on virtual child pornography are unconstitutional because "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performances or photographic or other visual reproduction of live performances, retains First Amendment protection." *Id.* at 764-65.

Amicus maintains that *Ferber's* language does not proscribe the CPPA's ban on virtual child pornography. First, the *Ferber* Court's holding was limited to those justifications for New York's child pornography laws that were presented, all of which relied on the harm to the subjects of child pornography. It is important to recognize that the technology that the CPPA addresses did not yet exist in 1982. Therefore, the New York Legislature did not consider it and this Court did not contemplate virtually realistic child pornography when *Ferber* was decided. Specifically, the Supreme Court granted New York's petition for *certiorari* to answer the following question:

> To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?

Ferber's holding is statutorily limited to actual child pornography and cannot be used to find either that the CPPA's prohibition of virtual child pornography violates the First Amendment or that Congress can only have a valid interest in child pornography laws that protect only the actual subjects of provably real child pornography.

Second, in *Osborne v. Ohio*, 495 U.S. at 111, this Court accepted two additional justifications for child pornography statutes other than protecting those children exploited in the pornography's creation. Agreeing with the Ohio Legislature and Ohio Supreme Court, this Court recognized that preventing the seduction of minors and encouraging the destruction of child pornography were valid justifications for the State's ban on the possession of child pornography. As stated in *Osborne*, 495 U.S. at 111:

> Other interests also support the Ohio law. First, as *Ferber* recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. 458 U.S. at 759.... The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

The First Circuit in *United States v. Hilton* upheld the constitutionality of the CPPA and stated that the *Osborne* Court intimated a "subtle, yet crucial, extension of [Congress's] legitimate interest to the protection of children not actually depicted in prohibited images." *United States v. Hilton*, 167 F.3d 61, 70 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 115 (1999).

As such, Congress was justified in detailing the harms of child pornography not only to its subjects, but also to all child sexual abuse victims. Conversely, the majority of the panel below in *Free Speech* erred in determining that the protection of children used in producing child pornography

can be the only legitimate justification for prohibiting its traffic.

C. CONGRESS'S COMPELLING INTERESTS IN BANNING VIRTUAL CHILD PORNOGRAPHY

1. SEDUCTION PURPOSES.

Congress concluded, among the several factual findings codified in the CPPA, that "child pornography is often used as a part of a method of seducing other children into sexual activity," *see Free Speech*, 198 F.3d at 1099 (Ferguson, J., dissenting) (quoting CONGRESSIONAL FINDINGS), and that virtual child pornography, because it is indistinguishable from real child pornography, will have the same effect on a pedophile and the pedophile's victims as "real" child pornography. *United States v. Acheson*, 195 F.3d 645, 649 (11th Cir. 1999).

Congress relied on scientific and law enforcement authorities in supporting the conclusion that pedophiles use child pornography to seduce their victims. Dr. Victor Cline, a clinical psychologist, professor, and veteran expert witness specializing in the treatment of sexual compulsions and addictions, testified before the Senate Judiciary Committee that pedophiles use child pornography to seduce children into engaging in sexual acts with them. HEARING BEFORE THE SENATE COMM. ON THE JUDICIARY. 104TH CONG., 2D SESS. 1996. This finding is also supported by the FINAL REPORT, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY at 649 (1986). The *Osborne* Court at 495 U.S. 103, 111 n.7 relying on the same REPORT stated:

> The Attorney General's Commission on Pornography, for example, states that "Child pornography is often used as part of a method of

> seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity."

Thereafter, this Court in *Osborne* held, "states have a legitimate interest in preventing pedophiles from 'using child pornography to seduce other children into sexual activity.'" *Id.*

Despite the above support for Congress's conclusion that virtual child pornography warrants prohibition in order to prevent the sexual abuse of children, the majority in *Free Speech* argued that no factual studies currently exist linking virtual child pornography with subsequent sexual abuse of children. 198 F.3d 1083, 1093 (9th Cir. 1999). The Ninth Circuit arrived at this conclusion by ignoring the important fact that technological advances in computer imaging render it possible to produce virtual child pornography that is indistinguishable from real child pornography. Therefore, a child's inability to make this distinction renders virtual child pornography on equal footing with real child pornography to the extent that they can both be used by pedophiles to seduce victims.

Furthermore, requiring conclusive scientific proof is an error this Court rejected when a demand for such proof of obscenity was made in *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 60-63 (1973), and the Court in *Osborne*, at 108-09, recognized that the "interests underlying child pornography far exceed the interests justifying" obscenity laws.

2. PREVENTION OF PEDOPHILES FROM EVADING PROSECUTION.

The CPPA's ban on traffic in realistic, virtual child pornography is necessary to enable the Government to

continue to prosecute all child pornographers, including those who use real children in production.

Before the passage of the CPPA, the Government was required to prove that the pornographic material at issue involved a real child engaging in sexually explicit activity. (SENATE HEARING, statement of Bruce Taylor, President and Chief Counsel, National Law Center for Children and Families). Computer-generated child pornography, however, could supply "a built-in reasonable doubt standard in every child exploitation/pornography prosecution." *Id.* A defendant could argue to a jury, under § 2252, that the Government could not prove that the child pornography at issue was "real" without identifying an actual child and that computers and imaging software could create or morph images that appear to be real, thus raising a reasonable doubt as to the authenticity of a picture that is or appears to be of a minor child being molested. An expert witness on imaging so testified in the trial of a child pornographer in *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), wherein the District Court correctly instructed the jury that "the Government had the burden of proving that each item of alleged child pornography did, in fact, depict an actual minor," but the jury in 1993 could and did conclude that such imaging technology was not so widely available or used to raise a reasonable doubt that the photos were real.

In *United States v. Coleman*, ARMY No. 9801240, 2001 CCA LEXIS 3, 13, ___M.J.___ (A.Ct.Crim.App. 2001), appellant pled and was found guilty to possession of child pornography under 18 U.S.C. § 2252. Thereafter, on review, he argued that his plea was improvident because insufficient evidence existed proving that the visual depictions at issue were of an actual minor. The Army Criminal Appeals Court recognized that had appellant pled not guilty and presented evidence that the images were computer-generated:

> The government may have had difficulty proving that real children were depicted in these images.... For this reason, it may have been more prudent to charge appellant with a violation of 18 U.S.C. § 2252A, even though the constitutionality of 18 U.S.C. § 2252A is under attack. *Compare United States v. James*, 53 M.J. 612 (N.M.Ct.Crim.App. 2000) (relying on First and Eleventh Circuit Courts of Appeal decisions in holding that 18 U.S.C. § 2252A's ban of computer-generated child pornography is constitutional), *petition granted*, 2000 CAAF LEXIS, No. 00-0592/NA (Nov. 16, 2000), and *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000) (18 U.S.C. § 2252A is constitutional) *with Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999) (holding that portions of 18 U.S.C. § 2252A are unconstitutionally vague and overbroad, but that the constitutional portions of the statute are severable).

An analogous argument is found in *Ferber* where the Court justified New York's ability to prohibit the distribution of child pornography produced outside the State, though "it is often impossible to determine where such material is produced." *New York v. Ferber*, 458 U.S. at 766 n.19. Likewise, because it is now almost impossible to determine between real and fake child pornography, such argument justifies prohibitions on interstate distribution of virtual, but authentically counterfeit, child pornography.

Furthermore, at the present time, expert testimony is not required to prove that a depiction is a photograph rather than some other type of technical reproduction, which does not depend on the use of live human subjects. *United States v. Nolan*, 818 F.2d 1015, 1017-18 (1st Cir. 1987). In *Nolan*,

the Court of Appeals found that it could "be within the range of ordinary competence for someone not a photographic expert to determine that she is viewing a photograph rather than, say, an artistic reproduction." *Id.* at 1018. This was the case when technology had not reached the point where realistic images could be created without the use of a real human model. Therefore, the prosecution was not required to rule out every conceivable way in which the child pornographic pictures could have been made.

With computer-generated child pornography on the market, it would be almost impossible for the state or federal government to prove that an image is of a real child, since even an expert may not be able to tell the difference. Therefore, pedophiles who possess and transport images of real children could be emboldened to do so without fear of punishment, making useless the existing statutes that currently prohibit traffic in "real" child pornography. Without the CPPA, a defendant would always be afforded the argument that the child is not real but instead virtual and, thus, a defendant will be able to argue a reasonable doubt that a real child was not proven to have been used in the production.

3. DESTRUCTION OF THE CHILD PORNOGRAPHY MARKET.

This Court has held that governments have an important justification for suppressing and trying to eliminate the child pornography market. In *Osborne*, 495 U.S. at 111, the Court recognized:

> The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. *Ferber*, 458 U.S. at 759. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging

> the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Since pedophiles could trade and sell virtual child pornographic materials instead of or in exchange for those that are of real children, virtual child pornography helps "keep the market for child pornography thriving." (S. REP. NO. 358, 104TH CONG., 2D SESS. 1996, testimony of Bruce A. Taylor, President and Chief Counsel for the National Law Center for Children and Families).

Furthermore, if the distribution of virtual child pornography is not prohibited, pedophiles who receive either form of child pornography would more than likely hold onto it, thinking that it was actually real or that they would have a good defense to any prosecution because they did not "know" their child pornography actually involved real children. The CPPA eliminates this excuse and rationalization for disseminating, receiving, or possessing child pornography. Additionally, by prohibiting the distribution of synthetic child pornography, the CPPA also decreases the supply of and demand for all child pornography.

D. BALANCE OF CONGRESS'S INTERESTS VERSUS ANY FIRST AMENDMENT INTEREST

As discussed above, Congress detailed several compelling interests for banning virtual child pornography. *Amicus* urges this Court to find that these justifications are compelling enough to outweigh the limited First Amendment interest in distributing counterfeit, "virtual" child pornography.

When reviewing the constitutionality of a statute, the Supreme Court generally accords extreme deference to the legislature when considering essentially factual assessments made with respect to the statute's enactment. *United States v. Pearl*, 89 F.Supp.2d 1237 (D. Utah 2000). In *Pearl*, the district court in upholding the CPPA, and faced with the issue of the standard to afford Congressional findings, relied on *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180 (1997). In *Turner*, the Court held:

> Courts must accord substantial deference to the predictive judgments of Congress... The Court owes deference to Congress's findings out of respect for its authority to exercise the legislative power and because the latter institution is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon legislative questions... Thus, even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end . . .

The Ninth Circuit failed to give "substantial deference" to Congress's findings and instead conducted its own weighing process, replacing its own factual findings for Congress's when it held that there exists no "demonstrated basis to link computer-generated images with harm to real children." *Free Speech*, 198 F.3d at 1094. Contrary to this determination, Congress found compelling evidence that advances in computer-imaging technology require the CPPA's proscriptions on virtual child pornography. *See* CONGRESSIONAL FINDINGS. These rationales outweigh the minimal First Amendment interest that may exist in possessing or distributing virtual child pornography.

Therefore, the balancing approach used by this Court in *Ferber* and *Osborne* sustains the constitutionality of the CPPA's ban on interstate or foreign commerce in such virtual child pornography.

II. NEW TECHNOLOGIES PROVIDING THE ABILITY TO CREATE VIRTUAL CHILD PORNOGRAPHY MAY REQUIRE INNOVATIVE JUDICIAL STANDARDS

It is undisputed that rapid technological advances have affected First Amendment jurisprudence. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) the Court struggled with defining the proper First Amendment analysis to be given to cable television regulations. *Amicus* submits that the CPPA is constitutionally valid under any standard of review. The Act passes a strict scrutiny test because of its narrow scope and incidental impact on any protected expressive claim, an intermediate level of scrutiny for its combination of conduct and alleged content characteristics, as well as any other traditional rational basis or compelling interest test. Though *amicus* submits that a strict scrutiny is inappropriate in this instance, an analysis under a fact-based, computer technology specific rationale is particularly instructive. As posed by Justice Breyer, First Amendment analysis may take into account the particular characteristics unique to the technology. This involves a fact-based determination, rather than a categorical analysis.

This view holds that the history of the Court's First Amendment jurisprudence is a continuing adaptation to changing circumstances. Justice Breyer in *Denver*, at 739-41 stated, "Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application."

Justice Breyer put forth a balancing approach containing four factors. First, he ascertained the importance of the justification behind the cable regulations. As is the case with the CPPA provisions, Justice Breyer determined that there existed "an extremely important justification... the need to protect children from exposure to patently offensive sex-related material." *Id.* at 743. As previously discussed, *Amicus* has brought to the Court's attention several compelling justifications for prohibiting the viewing and distributing of virtual child pornography.

Second, the uniqueness of the situation, in that the speech interests of the programmers and the operators had to be balanced against each other. *Id.* at 743. In the instant case, this Court must weigh the *de minimis* First Amendment interest in distributing virtual child pornography with the enumerated compelling interests found by Congress in banning such traffic.

Third, he looked for analogous cases and found *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to be on point and thereby, relied on it as precedent. *Amicus* asserts that the decisions in *Ferber* and *Osborne* are sufficiently similar to be considered precedential and supportive of the constitutionality of sections 2252A and 2256 (8).

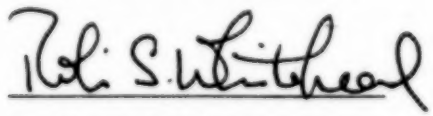
Finally, Justice Breyer reasoned that the statute was permissive in that it did not ban speech, but, instead, simply restored the speech rights of cable operators. *Denver*, 518 U.S. at 745. The CPPA does not ban materials that use adults to "portray" or "act" the role of minors, but only the conduct of distributing or possessing visual images that appear to be actual pictures of actual minors engaging in sexual exploitation.

Amicus maintains that Congress, in enacting the CPPA, has proscribed certain narrowly defined abuses of a new technology due to the very serious practical problems such abuses create. Therefore, the CPPA is valid under a balancing approach as suggested in *Denver*, under which the Government will not be required to "impose judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Id.* at 741.

CONCLUSION

For all of the above reasons, your *Amicus* prays that this Honorable Court reverse the judgment of the court below and declare all provisions of the Child Pornography Prevention Act of 1996 constitutional.

Respectfully submitted,



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No. 00-795

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

vs.

THE FREE SPEECH COALITION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Motion for Leave to File Brief Amici Curiae And Brief Amici Curiae of Hons. Sam Brownback, Robert Aderholt, Richard K. Armey, Bob Barr, Michael Collins, Randy Cunningham, Jeff Flake, Melissa Hart, Duncan L. Hunter, Henry J. Hyde, Ernest Jim Istook, Jr., Walter B. Jones, Jr., Steve Largent, Charles Pickering, Joseph R. Pitts, Bob Riley, Ileana Ros-Lehtinen, and J. C. Watts Supporting Petitioners

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Senator Sam Brownback (KS), a member of the United States Senate, and Congressmen Robert Aderholt (AL-4), Richard K. Armey (TX-26), Bob Barr (GA-7), Michael Collins (GA-3), Randy Cunningham (CA-51), Jeff Flake (AZ-1), Melissa Hart (PA-4), Duncan L. Hunter (CA-52), Henry J. Hyde (IL-6), Ernest Jim Istook, Jr. (OK-5), Walter B. Jones, Jr.

(NC-3), Steve Largent (OK-1), Charles Pickering (MS-3), Joseph R. Pitts (PA-16), Bob Riley (AL-3), Ileana Ros-Lehtinen (FL-18), and J. C. Watts (OK-4), each a member of the United States House of Representatives, respectfully moves this Honorable Court for leave to file the attached brief *amici curiae* in support of the petitioners in the above-captioned case.

The consent of counsel for the petitioners has been obtained. The consent of counsel for the respondents was requested but refused without explanation.

Each of the amici currently serves in the One Hundred Seventh Congress. These amici support the enactment of strict measures to curb the proliferation of child pornography. Because today's youth represent the future of our great nation, these amici believe that extensive efforts must be undertaken to shield and protect children from the type of serious harm caused by their sexual exploitation.

Amici take the position that child pornography is unprotected speech and deserves no First Amendment protection, even when such materials are produced using highly sophisticated computer technology. Given the pernicious, harmful effects on children and on society that child pornography and its peddlers cause, amici support great leeway for Congress regarding its regulation. The Child Pornography Protection Act seeks to eradicate the trafficking in child pornography in a manner that is both necessary and constitutionally permissible. The appropriate resolution of this case is a matter of substantial importance to these amici and their constituents.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii
INTEREST OF AMICI 1
SUMMARY OF ARGUMENT 2
ARGUMENT 5
I. VIRTUAL CHILD PORNOGRAPHY IS OUTSIDE THE SCOPE OF THE FIRST AMENDMENT 5
A. The Protection of Children is an Interest of the Highest Importance 5
B. Virtual Child Pornography is Indistinguishable from Standard Child Pornography 6
C. Even If Virtual Child Pornography Does Enjoy Some Degree of Protection, the Interests Supporting Its Elimination Far Outweigh Any Arguments in Its Favor 7
a. Virtual Child Pornography is Used to Seduce Children into Sexual Conduct 7
b. Virtual Child Pornography Serves as a Catalyst for Pedophiles in the Sexual Abuse of Children 8
c. Eliminating Virtual Child Pornography is Necessary to Allow Enforcement of Child Pornography Laws Against Child Pornography Using Actual Children 9
d. Eliminating Virtual Child Pornography is Necessary to Destroy the Market for Standard Child Pornography 10
e. Actual Children May Be Used in the Creation of Virtual Child Pornography 10

TABLE OF CONTENTS–cont'd

Page

II. THE CPPA IS NOT SUBSTANTIALLY OVERBROAD 11
III. THE CPPA IS NOT VAGUE 14
IV. THE NINTH CIRCUIT ERRED IN USING A STRICT SCRUTINY STANDARD 21
CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

American Communications Assn. v. Douds, 339 U.S. 382 (1950) 15
Boos v. Barry, 485 U.S. 312 (1988) 22
Boyce Motor Lines v. United States, 342 U.S. 337 (1952) 18-19
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 4, 12
City of Chicago v. Morales, 527 U.S. 41 (1999) 19
Coates v. Cincinnati, 402 U.S. 611 (1971) 19
FCC v. Pacifica, 438 U.S. 726 (1978) 5-6
Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999) 18
Frisby v. Schutz, 487 U.S. 474 (1988) 14
Ginsberg v. New York, 390 U.S. 629 (1968) 5
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 5
Grayned v. City of Rockford, 408 U.S. 104 (1972) ... 15, 16
Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 18-20
Houston v. Hill, 482 U.S. 451 (1987) 15
Kolender v. Lawson, 461 U.S. 352 (1983) 4, 14
Kovacs v. Cooper, 336 U.S. 77 (1949) 17
Liteky v. United States, 510 U.S. 540 (1994) 17
Miller v. California, 413 U.S.15 (1973) 2, 17
New York v. Ferber, 458 U.S. 747 (1982) ..... 2, *passim*
Osborne v. Ohio, 495 U.S. 103 (1990) ..... 5, *passim*
Pinkus v. United States, 436 U.S. 293 (1978) 18
Prince v. Massachusetts, 321 U.S. 158 (1944) 5
R.A.V. v. St. Paul, 505 U.S. 377 (1992) 7, 15, 21

Page(s)

Reno v. ACLU, 521 U.S. 844 (1997) 13
Roberts v. United States Jaycees,
468 U.S. 60 (1984) 14
United States v. Acheson,
195 F.3d 645 (11th Cir.1999) 12, 15
United States v. Arvin, 900 F. 2d 1385 (9th Cir. 1990),
cert. denied, 498 U.S. 1024 (1991) 18
United States v. Hilton, 167 F. 3d 61 (1st Cir.),
cert. denied, 120 S. Ct. 115 (1999) 11, 12, 13, 18
United States v. Lanier, 520 U.S. 259 (1997) 20-21
United States v. *Mento*, 231 F.3d 912 (4th Cir. 2000) 12
United States v. Raines, 362 U.S. 17 (1960) 15
United States v. Robinson, 137 F.3d 652 (1st Cir. 1998) .. 18
United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 19
Ward v. Rock Against Racism, 491 U.S. 781 (1989) .. 15, 17

CONSTITUTIONAL PROVISIONS AND STATUTES

18 U.S.C. §2251 ..... 2, 9
18 U.S.C. §2252 ..... 14, 19, 21
18 U.S.C. §2256 ..... 2, 11
Child Pornography and Obscenity Enforcement Act of
1988, Pub L. No. 100-690, 102 Stat. 4485 (1988) 2
Child Pornography Prevention Act of 1996 ..... 3, *passim*
U.S. Const. amend. 1 ..... *passim*

Page(s)

OTHER AUTHORITIES

Attorney General's Comm. on Pornography, Final
Report (1986) 8
Child Pornography Prevention Act of 1995: Hearing on
S. 1237 Before the Senate Comm. on the Judiciary,
104th Cong. (1996) 8, 9
"Note: Free Speech Coalition v. Reno: Has the Ninth
Circuit Given Child Pornographers a New Tool to
Exploit Children?" 35 U.S.F.L.Rev.109 (2000) 11
S. Rep. No. 358, 104th Cong. (1996) ..... 6, *passim*
Supreme Court Rule 37 1

INTEREST OF AMICI CURIAE[1]

This brief is filed on behalf of Senator Sam Brownback (KS), a member of the United States Senate, and Congressmen Robert Aderholt (AL-4), Richard K. Armey (TX-26), Bob Barr (GA-7), Michael Collins (GA-3), Randy Cunningham (CA-51), Jeff Flake (AZ-1), Melissa Hart (PA-4), Duncan L. Hunter (CA-52), Henry J. Hyde (IL-6), Ernest Jim Istook, Jr. (OK-5), Walter B. Jones, Jr. (NC-3), Steve Largent (OK-1), Charles Pickering (MS-3), Joseph R. Pitts (PA-16), Bob Riley (AL-3), Ileana Ros-Lehtinen (FL-18), and J. C. Watts (OK-4), each of whom is a member of the United States House of Representatives. Each of the amici currently serves in the One Hundred Seventh Congress. These Congressman and Senators support the enactment of strict measures to curb the proliferation of child pornography. Because today's youth represent the future of our great nation, these amici believe that extensive efforts must be undertaken to shield and protect children from the type of serious harm caused by their sexual exploitation.

The amici Congressmen and Senator have dedicated time and effort to defending and protecting children. It is this commitment to the defense of children that compels them to support the stringent regulation of child pornography. Amici take the position that child pornography, even as generated by

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1. Counsel for the petitioners consented to the filing of this brief; a letter of consent has been filed with the Clerk of Court pursuant to Rule 37; counsel for the respondents has denied consent. Pursuant to Rule 37.6, amici disclose that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amici curiae*.

current computer technology, is unprotected speech and deserves no First Amendment protection. Given the pernicious harmful effects both to children and to society as a whole that child pornography and its peddlers cause, Congress should be given great leeway regarding its regulation. The Child Pornography Protection Act seeks to eradicate the trafficking in child pornography in a manner that is both necessary and constitutionally permissible. Amici, therefore, urge this Court to reverse the erroneous decision of the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that child pornography is outside the scope of the First Amendment. Because child pornography is not entitled to protection under the First Amendment, it may be regulated regardless of whether it would otherwise be considered obscene under *Miller v. California*, 413 U.S. 15 (1973). In this important respect, judicial determination of challenges to the constitutionality of federal statutes criminalizing child pornography, its creation, its possession, and its use, are categorically different from the analysis brought to bear on pornography depicting adults.

Six years after the *Ferber* decision, Congress found that electronic bulletin boards and other precursors of the Internet had become a popular medium for trafficking in child pornography. In response, Congress outlawed the use of computers to transport, distribute, or receive such materials. *See* Child Pornography and Obscenity Enforcement Act of 1988, Pub L. No. 100-690, 102 Stat. 4485 (1988); 18 U.S.C. §§2251-2256. Despite Congress' effort, by 1996, law enforcement officials reasonably concluded that pedophiles and others had discovered a loophole in the definition of "child

pornography." Using enhanced computer technology, pedophiles and others were exploiting that loophole to create, distribute and use *virtual* images of child pornography.

Specifically, *virtual* child pornography involves the creation of computer generated images, often "morphed" from actual photographs, depicting children engaged in sexual conduct. These images are indistinguishable from actual photographs of real children. Spurred by clear and substantial evidence that *virtual* child pornography was used by pedophiles to seduce children into sexual behavior, Congress enacted the Child Pornography Prevention Act of 1996 ("CPPA"). *See* 18 U.S.C. §2251 Notes Cong. Findings, Section 101(a)(8). Through the CPPA, Congress amended the definition of "child pornography" to include "any photograph, film, video, picture, or computer or computer generated image or picture" where:

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct;
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C.2256(8).

Congress acted within its authority, and without derogation of any conceivable First Amendment value, in closing the loophole in federal law that had become the refuge of *virtual* child pornographers. As explained in Argument I, child

pornography is *sui generis*. Unlike pornography depicting adults, child pornography is, categorically, outside of the ambit of the First Amendment. Moreover, Congress has concluded that the interest embodied in the CPPA – the protection of children from abuse, degradation, and perversion – is of the highest order. Consequently, even if there were something about *virtual* child pornography that enjoyed any degree of constitutional protection (and there is not), the compelling interests that motivated Congress and that are served by the CPPA displace any such consideration.

The Respondents challenged the CPPA on grounds of overbreadth. But this Court has reserved the "strong medicine" of overbreadth, *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), to those few instances where the overbreadth of an enactment is both real and substantial. As explained in Argument II, the CPPA has a plainly legitimate scope, and Congress has chosen entirely proper means to the end of eliminating child pornography, means that do not sweep too broadly.

Nor is there any merit to the Respondents' vagueness argument. *See* Argument III, *infra*. The statutory phrases, "appears to be" and "conveys the impression," provide "sufficient definiteness" for men of common understanding to know what conduct is prohibited, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Moreover, the CPPA imposes a requirement of scienter that serves to further secure from wrongful prosecution any individual whose creation of, acquisition of, distribution of, or use of, child pornography was, in any constitutionally significant sense, *innocent*.

Finally, as explained in Argument IV, the Ninth Circuit erred when it subjected the CPPA to strict scrutiny. The court below failed to comprehend the significance of this Court's

determination in *Ferber* that child pornography falls outside the scope of the First Amendment's protections. Consequently, the court below erred because it accorded constitutional deference to a form of communication that was entitled to none.

ARGUMENT

I. VIRTUAL CHILD PORNOGRAPHY IS OUTSIDE THE SCOPE OF THE FIRST AMENDMENT

A. The Protection of Children is an Interest of the Highest Importance

Congress has concluded that protecting children from the harms associated with the production and use of child pornography is an interest of the highest order. This Court has also acknowledged that the interest identified by Congress is compelling. "It is evident beyond the need for elaboration" that the government has a compelling interest in "safeguarding the physical and psychological well-being of a minor." *Ferber*, 458 U.S. at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Further, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." 458 U.S. at 757 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)). "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." 458 U.S. at 757.

This Court has sustained laws protecting the psychological and physical well-being of children "even when the laws have operated in the sensitive area of constitutionally protected rights." *Id. See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990) (Ohio statute proscribing the mere possession and viewing of child pornography); *Ginsberg v. New York*, 390 U.S. 629 (1968) (New York law protecting children from exposure to nonobscene pornography); *FCC v. Pacifica*, 438 U.S. 726

(1978) (regulation of indecent but nonobscene radio broadcasts to protect children).

B. Virtual Child Pornography is Indistinguishable from Standard Child Pornography

There is no dispute that the CPPA is intended to eliminate a form of child pornography that is the virtual twin of the child pornography addressed by this Court in *Ferber* and *Osborne*. In *Ferber*, this Court sustained New York's prohibition targeted at materials that "visually depict sexual conduct by children below a specified age." 458 U.S. at 764. The CPPA proscribes the same imagery. The CPPA regulates only those sexually explicit images "which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct." S. Rep. No. 104-358, at pt. I, IV(B) (1996). The Act "applies to the same type of photographic images already prohibited, but which does not require the use of an actual minor in its production." *Id.* at pt. IV(C).

Thus, Congress has simply adjusted child pornography laws to deal with the permutations of the modern computer age. The images proscribed, however, have remained virtually unchanged. Indeed, as noted above, Congress intended the CPPA to reach images that, but for the technological advances giving rise to their creation, were already proscribed by law. The *virtual* images to which Congress directed the CPPA are indistinguishable from those regulated by pre-CPPA law.

In *Ferber*, this Court held that "child pornography . . . like obscenity, is unprotected by the First Amendment." 458 U.S. at 764. The value of such expression is "exceedingly modest, if not *de minimus*." *Id.* at 762. Thus, child pornography falls within one of the well-known categories of expression that are outside the scope of the First Amendment. *Id.* at 764. Such

categories – obscenity, fighting words, libel, and here, child pornography – may be "regulated because of their constitutionally proscribable content." *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992). Since its content is indistinguishable from, and indeed is identical to, standard child pornography, *virtual* child pornography lies properly within the same category of unprotected speech.

C. Even If Virtual Child Pornography Does Enjoy Some Degree of Protection, the Interests Supporting Its Elimination Far Outweigh Any Arguments in Its Favor

Assuming *arguendo*, that virtual child pornography enjoys some degree of First Amendment protection – it does not – the surpassing interests supporting its elimination far outweigh any conceivable interests to legalize it. In a similar context involving standard child pornography, this Court observed in *Osborne*: "assuming, for the sake of argument," that there are any "First Amendment interest[s] in viewing and possessing child pornography . . . the interests underlying child pornography prohibitions far exceed the interest justifying" any claim to protected status. *Osborne*, 495 U.S. at 108. The principle articulated in *Osborne* is equally applicable here.

There are at least five compelling interests that support Congress' enactment of the CPPA as a means to restrict virtual child pornography. Each of these reasons readily outweighs any putative interest of distributors or recipients of virtual child pornography.

a. Virtual Child Pornography is Used to Seduce Children into Sexual Conduct

The CPPA is necessary to prevent pedophiles from using child pornography to seduce children into sexual activity. In part, Congress was prompted to enact the CPPA because

"[c]hild pornography is often used as part of a method of seducing . . . children into sexual activity." *See* Congressional Findings Section 101(a). Indeed, the use of child pornography by pedophiles to seduce children into sexual activity is not subject to serious dispute. *See* Attorney General's Comm. on Pornography, Final Report at 649 (1986); Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary, 104th Cong. 16 (1996) (Statement of Dr. Victor Cline). This Court acknowledged in *Ferber*, "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," 458 U.S. at 759, and in *Osborne*, "that pedophiles use child pornography to seduce children into sexual activity," 495 U.S. at 111. Because it is "indistinguishable" from standard child pornography, *virtual* child pornography can be used the same way and have the "same seductive effect" on children. *See* Senate Hearing at 70.

The Ninth Circuit below erred in trivializing this interest. While this Court in *Ferber* found it unnecessary to discuss the point in depth, it affirmatively found that such materials are in fact "intrinsically" related to sexual abuse of children. 458 U.S. at 759. Further, eight years after *Ferber*, in *Osborne*, this Court specifically found that "encouraging the destruction of these materials is . . . desirable because evidence suggests that pedophiles use child pornography to seduce children into sexual activity." *Osborne*, 495 U.S. at 111.

b. Virtual Child Pornography Serves as a Catalyst for Pedophiles in the Sexual Abuse of Children

In enacting the CPPA, Congress found that virtual child pornography serves as a catalyst that "stimulates" and "inflames" pedophiles into sexual abuse of children by "whet[ting] their own sexual appetite and as a model for sexual

acting out with children." *See* Cong. Findings §101(a)(4). Testimony before Congress on the CPPA suggested that virtual child pornography has the same effect on pedophiles as ordinary child pornography. Senate Hearing at 38 and 92.

c. Eliminating Virtual Child Pornography is Necessary to Allow Enforcement of Child Pornography Laws Against Child Pornography Using Actual Children

The CPPA is necessary to allow the effective enforcement of existing child pornography law. In enacting the CPPA, Congress found that the advent of virtual child pornography made it difficult, if not impossible, to distinguish computer generated images from actual photographic depictions of children engaging in sexual activity. 18 U.S.C. §2251 note (Supp. IV 1998) (Finding 6(A)) ("computer imaging technology" makes it impossible to determine if offending material was "produced using children").

Under pre-CPPA child pornography laws, the prosecution was required to prove that the pornographic image depicted a real child–an impossible task with the development of computer generated images. *Id.* A criminal defendant could always assert as a defense that the child depicted in a sexually explicit pose was virtual and not real. Such an assertion is virtually impossible to refute from an examination of the image itself. Thus, the CPPA was necessary to cure the inability to effectively enforce existing child pornography laws. And, as Congress found, the failure to criminalize virtual child pornography increases the danger to children from pedophiles and child pornographers because the risk of conviction and punishment is reduced. S. Rep. No. 104-358, at 20.

d. Eliminating Virtual Child Pornography is Necessary to Destroy the Market for Standard Child Pornography

The CPPA is a necessary measure in destroying the market for child pornography depicting actual children. In *Osborne*, this Court recognized that "[i]t is . . . surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who posses and view the product, thereby decreasing demand." 495 U.S. at 109-10. Similarly in *Ferber* this Court recognized the legitimacy of a similar argument: "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, thereby decreasing demand." 458 U.S. at 761.

The legislative record on the CPPA contains testimony that persons who trade and sell images that are indistinguishable from those of actual children "keep the market of child pornography thriving." S. Rep. No. 104-358 at 91. This result obtains because pictures that look like children engaged in sexual activities can be exchanged for identical pictures that are of actual children engaged in the same activities. By eliminating the indistinguishable virtual images of children engaged in sexual conduct, the entire market of child pornography is reduced. *See* Cong. Findings, §101(a)(12) ("prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to . . . eliminate the market for the sexual exploitive use of children").

e. Actual Children May Be Used in the Creation of Virtual Child Pornography

Real children may be used in the creation of virtual child

pornography. Indeed, a glaring deficiency of the Ninth Circuit's opinion below was its assumption that the creation of child pornography does not involve the use of real children. On the contrary, virtual child pornography can be created by morphing standard child pornography involving the photographing of real children in actual sexual conduct.[2] As the First Circuit observed in *United States v. Hilton*, "the material may have been created through the abuse of an actual minor but altered so that it may be impossible to show that a real child was ever involved in its creation." 167 F. 3d 61, 73 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999). Under pre-CPPA child pornography law, the pedophile would likely escape criminal liability because of the impossibility of distinguishing virtual from standard child pornography.

II. THE CPPA IS NOT SUBSTANTIALLY OVERBROAD

The Respondents' overbreadth challenge to the CPPA's definition of virtual child pornography is misguided. The CPPA defines child pornography as any virtual depiction that "appears to be" or is promoted or distributed to "convey [] the impression that the material is . . . of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(B), (D) (Supp. IV. 1998). While the divided panel of the Ninth Circuit

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2. *See* "Note: Free Speech Coalition v. Reno: Has the Ninth Circuit Given Child Pornographers a New Tool to Exploit Children?" 35 U.S.F.L.Rev. 109, 181 (2000) (explaining that after actual photographs are made, pedophiles can scan "them into a computer and alter the child's characteristics"). *And see* Cong. Findings, §101(6)("computer imaging technology can be used to . . . alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for the unsuspecting viewers to identify the individuals").

considered this language problematic, the courts of appeal for the First, Eleventh, and Fourth Circuits have held that the language passes constitutional muster. *See Hilton*, 167 F. 3d at 72-73; *United States* v. *Mento*, 231 F.3d 912 , 921-922 (4th Cir. 2000); and *United States v. Acheson*, 195 F.3d 645, 650-652 (11th Cir.1999).

This Court has repeatedly emphasized that the overbreadth doctrine is "strong medicine" and must be used "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. "When a federal court is dealing with a federal statute challenged as overbroad, it should . . . construe the statute to avoid constitutional problems if the statute is subject to such limiting construction." *Ferber*, 458 U.S. at 769 n.24; *Osborne*, 495 U.S. at 119 ("Courts routinely construe statutes so as to avoid the statutes' potentially overbroad reach"). Before a court invalidates a statute for overbreadth, the overbreadth "must not only be real, but substantial as well, judged in relation to the statutes plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

The Respondents erroneously assert that the "appears to be" language of the CPPA is too broad because it criminalizes speech accorded First Amendment protection. The CPPA, however, proscribes computer generated child pornography that is virtually identical to standard child pornography. Congress intended the CPPA to regulate narrowly only those visual depictions "virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct." S. Rep. No. 104-358, at pt. I, IV(B).

The "appears to be" language "applies to the same type of photographic images already prohibited, but . . . does not require the use of an actual minor in its production." *Id.* at pt. IV (C). By employing the phrase "appears to be," the Senate indicated that it was simply "extending [the prohibition against

child pornography] from photographic depictions of actual minors engaging in sexually explicit conduct to the identical type of depiction, one which is virtually indistinguishable from the banned photographic depiction." *Id.*; *and see Hilton*, 167 F.3d at 72. Because its application is limited to images that are "identical" to and "indistinguishable" from standard child pornography, any overbreadth argument must fail. For this reason, any concern that the CPPA could be applied against drawings, cartoons, sculptures, or paintings, is specious. *See Hilton*, 167 F.3d at 72.[3]

The Respondents have also raised the argument that the CPPA is susceptible to application against pornography that contains youthful appearing adults engaged in sex acts. This argument is undercut however by the fact that almost all prosecutions "under the 'appears to be a minor' provision would involve images of pre-pubescent children or persons who otherwise clearly appear to be under the age of 18." *Hilton*, 167 F.3d at 73. As Congress found, the market for such pornography is primarily composed of pedophiles, "who by definition have a predilection for pre-pubertal children." *Id.*; *see* S. Rep. No. 104-358, at sec. 2, pts. IV(A), (C). This argument is also flawed by its "inordinate focus on the arguably fuzzy line between age 17 and 18, a line which, as with many laws, must be drawn somewhere." *Hilton*, 167 F. 3d at 73.

In any event, the hypothetical possibility of application of

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3. Also contrast *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), which invalidated an overbroad ban on "indecent" expression on the Internet on the grounds that such expression constitutes protected speech. The Court expressly preserved the government's right to prosecute the communication of obscenity or child pornography on the Internet. *Id.* at 877 n.44.

the CPPA in an impermissible context does not warrant invalidation. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (declining to invalidate all "hypothetical applications" of ordinance in resolving facial challenge). As this Court stated in *Ferber*, "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine." 458 U.S. at 772.

Finally, any perceived overbreadth issues raised by Respondents are cured by the affirmative defenses of the CPPA. 18 U.S.C. §2252A(C)(Supp. IV 1998). Potential defendants are shielded from prosecution if the alleged child pornography was produced using "an actual person" who was an adult "at the time the material was produced," and the defendants did not "intentionally pander the material as being child pornography." *Id.*

III. THE CPPA IS NOT VAGUE

Respondents also assert that the CPPA's use of the phrases "appears to be" and "conveys the impression" are vague. Again, this assertion is misguided. To be sure, a statute must provide adequate notice of the activity it prohibits. The Constitution only imposes, however, "a requirement that the government articulate its aims with a *reasonable degree of clarity*." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (emphasis added). Thus, a statute will withstand a vagueness challenge if it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary or discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

"Perfect clarity and precise guidance have never been

required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). This Court has noted that some areas of expression are more sensitive than others because "a limited categorical approach has remained an important part of [] First Amendment jurisprudence." *R.A.V. v. St. Paul*, 505 U.S. at 383. "Sexually explicit images falling close to the line separating adult pornography and unprotected child pornography are outside the most sensitive areas of speech . . . ." *United States v. Acheson*, 195 F.3d at 652. As this Court explained in *Ferber*, legislators should be given "greater leeway" when acting to protect the well-being of children. 458 U.S. at 756.

Moreover, speculation about possible vagueness in hypothetical situations not before this Court cannot support a facial challenge when the law is valid "in the vast majority of its intended applications." *United States v. Raines*, 362 U.S. 17, 23 (1960). As this Court said in *Grayned v. City of Rockford*, 408 U.S. 104, 112 n.15 (1972), "[i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of disputed terms will be in nice question.'" (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950)). Respondents are possessed precisely of that "fertile legal imagination." But, as this Court has explained,

> We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. . . . Instead, in a facial challenge to the overbreadth and vagueness of a law, a Court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.

Houston v. Hill, 482 U.S. 451, 458 (1987) (citations omitted). *See also Osborne*, 495 U.S. at 116 (sustaining conviction under

child pornography possession law that was "imprecise at its fringes"). Therefore, Respondents here cannot succeed in their vagueness challenge merely by showing the possibility of an impermissible application.

The Respondents contend that the use of the terms "appears to be of a minor"and "conveys the impression that the material contains. . . ." are subjective. Because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. In *Grayned*, this Court upheld the constitutionality of an anti-noise ordinance challenged for vagueness.[4] *Id.* at 107-108. The Court stated that "[t]he words of the [] ordinance are marked by flexibility and reasonable breadth, rather than meticulous specificity, but we think it is clear what the ordinance as a whole prohibits." *Id.* at 110 (citation omitted). The Court noted that a phrase taken from the ordinance such as "tends to disturb" or "adjacent" could, by itself, appear imprecise. Given the purpose of the ordinance ("for the protection of schools"), and its context (school grounds and activities), however, this Court concluded that the ordinance "clearly delineated its reach in words of common understanding." *Id.* at 110-112 (internal quotation omitted). Thus, even if a statutory phrase were imprecise, it would present no vagueness problems if its meaning can be tied to the context in which a given statute

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4. The anti-noise ordinance in *Grayned* provided the following:
[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof . . . .
408 U.S. at 107-108.

operates. Such is the case here.

In *Ward v. Rock Against Racism*, this Court dismissed a facial challenge to city guidelines for the use of a band shell on the grounds of unbridled discretion. The city guidelines stated that their goals were to "provide the best sound for all events" and to "insure appropriate sound quality balanced with respect to nearby residential neighbors and the . . . quiet zone of [the area]." 491 U.S. at 794. This Court concluded, "[w]hile these standards are undoubtedly flexible, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.*

Likewise, in *Kovacs v. Cooper*, 336 U.S. 77 (1949), this Court rejected a vagueness challenge to an ordinance forbidding "loud and raucous" sound amplification. This Court observed, "[w]hile these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." *Id.* at 79. Similarly, under the CPPA, any interested individual will know what is forbidden.

Neither is the CPPA subject to discriminatory enforcement. First, it is well settled that objective determinations based upon a person's appearance or actions are routinely accepted in the courts. *See*, *Liteky v. United States*, 510 U.S. 540, 553 n.2 (1994) (noting that recusal motions under 28 U.S.C. §455(a) are governed by "objective appearance of impartiality" test); *Ferber*, 458 U.S. at 751 (approved definition of child pornography banning "simulated" sexual conduct, which in ordinary usage means "to have or take on the appearance of"); *Miller*, 413 U.S. at 24 (obscenity law based on whether sexually explicit material appeals to a "prurient interest" and is "patently offensive" to an "average person").

A trier of fact must decide, based on the totality of the

circumstances, whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity. *See* S. Rep. No.104-358, at pt. IV(C); and 18 U.S.C. §2256; *also see Hilton*, 167 F.3d at 75. To prove this fact, the government may use the same type of evidence used before the CPPA came into effect. For example, in the case of pre-pubescent children, the government may show the trier of fact the actual pictures so that it may conclude whether the virtual image "appears to be" a minor. *See, e.g., United States v. Arvin*, 900 F. 2d 1385, 1390 n.4 (9th Cir. 1990) (citing a jury instruction that requires the jury to decide whether prepubescent girls are "minors" based upon their own "observations of the pictures"), *cert. denied*, 498 U.S. 1024 (1991). In cases involving images of minors that have reached puberty, expert witnesses may testify as to the physical development of the depicted persons, and as to their age. *Hilton*, 167 F.3d at 75; *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1103 (9th Cir. 1999) (Fergusen, J., dissenting). Evidence may also be introduced as to how the distributor, creator, or possessor treated or labeled the material. *See, e.g., United States v. Robinson*, 137 F.3d 652, 653 (1st Cir. 1998)(noting that the pornographic photographs listed the ages of the boys depicted); *Hilton*, 167 F.3d at 75. *And see Pinkus v. United States*, 436 U.S. 293, 303-304 (1978) (the manner in which the pornography was created, promoted, or distributed is relevant in the determination of its unprotected status as obscenity).

Furthermore, the scienter requirement in the CPPA mitigates against any asserted vagueness concerns. This Court "has recognized that a scienter requirement may mitigate a law's vagueness." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Likewise, in *Boyce Motor Lines v.*

United States, 342 U.S. 337, 342 (1952), this Court upheld a law regulating the transporting of explosives because a "[scienter] requirement . . . does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid." Under CPPA, the government must prove beyond a reasonable doubt that an individual "knowingly" possessed the child pornography. 18 U.S.C. §2252A(a)(5)(B). Indeed, the government must prove that the individual purposefully acquired or distributed the material, and that he did so believing that the material was sexually explicit in nature, and that it depicted an image of a person who appeared to him to be under 18 years of age. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (child pornography scienter requirement "extends to both the sexually explicit nature of the material and the age of the performers").[5]

This Court's analysis in *Hoffman Estates* also proves helpful. *Hoffman* involved a civil ordinance, but the Court termed it "quasi-criminal" and applied a "relatively strict test,"

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5. Contrast the unconstitutional anti-loitering ordinance this Court invalidated in *City of Chicago v. Jesus Morales*, 527 U.S. 41 (1999). That ordinance, which could not be saved by a narrowing construction, made it a crime to "loiter" "with no apparent purpose." After recognizing the constitutional right of persons to "remain in a public place," this Court held the ordinance fatally defective because it omitted any *scienter* requirement, and because it was impossible for any persons to "know if he or she" was "standing in a public place" without any "apparent purpose." *Id.* at 57. This open-ended language was "vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Id.* at 60 (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)).

which the ordinance survived. 455 U.S. at 499. The law required licensing for anyone selling "any items . . . designed or marketed for use with illegal [] drugs." *Id.* at 500. The Court found that the challenged words "designed or marketed for use" were "sufficiently clear." *Id.* at 503. This was because the ordinance and administrative guidelines in effect required a license if a store "display[ed] its wares in a manner that encourage[d] illegal drug use." *Id.* at 502. The *Hoffman* Court also found a scienter requirement in the law since one could "scarcely market items for a particular use without intending that use." *Id.* Finally, the Court noted that although specific future applications could engender constitutional problems, it would consider such problems when they arose. *See id.* at 504.

Likewise, the statute in this case is similar in certain aspects to the anti-drug law upheld in *Hoffman*. The anti-drug ordinance prohibited marketing certain items for use with illegal drugs even if those items could be used for other legitimate purposes. This Court looked to the market that the vendor was targeting. Similarly, the CPPA prohibits marketing images as child pornography even if those images were made using youthful-looking adults. Thus, like the ordinance in *Hoffman*, the CPPA withstands a vagueness challenge, and any possible misapplications of it should be addressed in the future if they arise.[6]

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6. Another reason why the vagueness challenge should rejected in this case is provided by the rule of limiting construction for criminal statutes, the so-called "junior version of the vagueness doctrine." *United States v. Lanier*, 520 U.S. 259, 266 (1997). As the *Grayned* Court noted, "vague laws may trap the innocent by not providing fair warning." 408 U.S. at 108. According to *Lanier*, one of the three "related manifestations of [] fair warning" is "this canon of strict construction of criminal statutes affecting protected speech activities, or rule of lenity," which "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." 520 U.S. at 266. "The touchstone is whether the statute, either [alone or as construed], made it reasonably clear at the time of the charged conduct that the conduct was criminal." *Id.* at 267. If so, the statute will be found to give adequate warning and thus comply with due process, as the Court found in *Lanier*. 520 U.S. at 266 (upholding a conviction under a statute prohibiting "the deprivation of any rights . . . secured . . . by the Constitution" and rejecting a "fair warning" challenge). Thus, this statue withstands a vagueness challenge because it allows for limiting construction by the courts on a case by case basis so as to proscribe only the conduct clearly covered.

Finally, with regard to "real" depictions involving young-looking persons of indefinite age, the CPPA provides an affirmative defense to sellers, distributors, and producers who can provide proof of the participants' age. 18 U.S.C. §2252(A)(c).

Based on these requirements and safeguards, any assertion that the CPPA is subject to arbitrary or discriminatory enforcement is misplaced.

IV. THE NINTH CIRCUIT ERRED IN USING A STRICT SCRUTINY STANDARD

Strict scrutiny analysis applies only when the government engages in content based discrimination against a *protected* category of expression. *R.A.V.*, 505 U.S. at 377. Despite the fact that child pornography is an *unprotected* category of expression, the Ninth Circuit erroneously employed this standard in its consideration of the CPPA. The appellate court would have been better directed to have adopted the same analysis used by the Court in *Ferber* and *Osborne* where this Court did not employ strict scrutiny analysis. Even if strict

scrutiny analysis is used, however, the CPPA passes constitutional muster. *See Boos v. Barry*, 485 U.S. 312 (1988)(content based restrictions on protected expression must be narrowly drawn to serve a compelling governmental interest).

As discussed in Argument I, *supra*, Congress identified at least five compelling government interests advanced by the regulations contained in CPPA: (1) virtual child pornography is used to seduce children into sexual conduct; (2) virtual child pornography serves as a catalyst by stimulating pedophiles; (3) eliminating virtual child pornography is necessary to effectuate enforcement of child pornography laws that do in fact involve actual children engaging in sexual conduct; (4) eliminating virtual pornography is necessary to destroy the market in standard child pornography; and (5) actual children may be used in the creation of virtual child pornography. In *Osborne*, this Court explicitly approved at least two of these governmental interests: eliminating child pornography because pedophiles and would be child abusers use it to seduce children; and to stamp out the market for the production of child pornography. 495 U.S. at 109-111. Furthermore, in *Ferber*, this Court explicitly recognized that the distribution of materials "depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children." 458 U.S. at 759. At bottom, the government interests advanced by CPPA are no less powerful than the interests advanced by laws designed to stamp out standard child pornography since both forms of child pornography involve the sexual abuse of children. And, as the Court observed in *Ferber*, this interest "constitutes a government objective of surpassing importance." *Id.* at 757.

Finally, as discussed in Argument II, *supra*, the approach to *virtual* child pornography taken by Congress in its enactment

of the CPPA is not overbroad, but narrowly tailored to advance these compelling governmental interests. Indeed, the CPPA is limited in its application to a form of child pornography that is "indistinguishable" from and virtually "identical" to standard child pornography.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed.

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Supreme Court of the United States

John D. Ashcroft, Attorney General of the United States,
Petitioner,

v.

The Free Speech Coalition, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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32 pp

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TABLE OF CONTENTS

Page

Statement of Amici Interest 1

Summary of Argument 3

Argument 4

Giving Deference to the Judgment of Congress That the Ban on Virtual Pornographic Images of Children Will Protect Children from Harm and Will Facilitate Law Enforcement, the Child Pornography Prevention Act Fully Accords with First Amendment Principles 4

Conclusion 13

TABLE OF AUTHORITIES

Cases Cited: **Page**

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 10

Doe v. Poritz,
662 A.2d 367 (N.J. 1995) 1

Free Speech Coalition v. Reno,
198 F.3d 1083 (9th Cir. 1999) 3, 9, 10

New York v. Ferber,
458 U.S. 747 (1982) 9, 11, 12

Osborne v. Ohio,
495 U.S. 103 (1990) 11, 12

Turner Broadcasting System, Inc. v. F.C.C.,
512 U.S. 622 (1994) 8, 9

Turner Broadcasting System, Inc. v. F.C.C.,
520 U.S. 180 (1997) 1, 8

United States v. Acheson,
195 F.3d 645 (11th Cir. 1999) 10

United States v. Hilton,
167 F.3d 61, *reh. en banc den.* (1st Cir.),
cert. den., 528 U.S. 844 (1999) 10

United States v. Mento,
231 F.3d 912 (4th Cir. 2000), *pet. for cert. pending* (January 21, 2001) 10

Young v. American Mini Theaters,
427 U.S. 50 (1976) 10

Statutes Cited: **Page**

Child Pornography Prevention Act of 1996,
18 U.S.C. § 2251 *et seq.* . . . . . *passim*

18 U.S.C. § 2251, Historical and Statutory
Notes, Congressional Findings . . . . . *passim*

18 U.S.C. § 2252A 3, 4

18 U.S.C. § 2256 . . . . . 3, 4

Ariz.Rev.Stat.Ann. § 13-3553 2

Ark.Code Ann. § 5-27-605 2

Del.Code Ann. Title 11 § 1103 2

Del.Code Ann. Title 11 § 1108 2

Ga.Code § 16-12-100 2

Idaho Code § 18-1507 2

720 Ill.Comp.Stat. § 5/11-20.1 2

Iowa House File 327,
Seventy-Ninth General Assembly (eff. 7/1/01) 2

Kan.Stat.Ann. § 21-3516 2

Minn.Stat.Ann. § 617.246 2

Miss.Code Ann. § 97-5-33 2

Neb.Rev.Stat. § 28-1463.03 2

	Page
Nev.Rev.Stat.Ann. § 200.700	2
Nev.Rev.Stat.Ann. § 200.730	2
N.J.Stat.Ann. § 2C:24-4	2
N.M.Stat.Ann. § 30-6A-2	2
N.M.Stat.Ann. § 30-6A-3	2
S.D.Cod.Laws § 22-22-24	2
Rev.Code Wash.Ann. § 9.68A.060	2
W.Va.Code § 61-8C-3	2
Wisc.St.Ann § 948.12	2
Va.Code § 18.2-374.1	2
Fla. Bill No. CS/HB 203	2

Other Authorities Cited:

	Page
Sen. Rep. No. 104-358 (1996)	5, 6, 7
1 Attorney General's Commission on Pornography, Final Report (1986)	5
Kohn, *Shattered Innocence, Child Sexual Abuse is Yielding its Dark Secrets to the Cold Effects of Research*, Psychol. Today, Feb. 1987	1

	Page
M. Rimm, *Marketing Pornography on the Information Superhighway*, 83 Geo. L.J. 1849 (1995)	1
Note, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996 -- A Reply to Professor Burke and Other Critics*, 35 Harv. J. On Legis. 245 (1998)	8

STATEMENT OF AMICI INTEREST

The States have two related compelling interests in this Court's consideration of the federal ban on "virtual" child pornography: the protection of children and the facilitation of effective law enforcement. These interests, grounded in findings based on "substantial evidence" as to both "the harm to be avoided and the remedial measures adopted," are entitled to deference, outweigh any First Amendment considerations, and require that the ban be upheld. *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 197 (1997).

Children are the "most vulnerable and defenseless" members of our society. *Doe v. Poritz*, 662 A.2d 367, 376 (N.J. 1995) (upholding New Jersey's sexual offender registration and community notification statute). Some reports indicate that as many as one in every six Americans has been sexually molested as a child. Kohn, *Shattered Innocence, Child Sexual Abuse is Yielding its Dark Secrets to the Cold Effects of Research*, Psychol. Today, Feb. 1987, at 54. The States, as well as Congress, have a duty to protect those who are least able to protect themselves.

The Internet explosion has challenged Congress' and the States' efforts to protect children from the downstream effects of such readily-available, though illegal, material. Child pornography, an effective tool in child seduction, is widely available on the Internet, which is saturated with such materials. *See* Marty Rimm, *Marketing Pornography on the Information Superhighway*, 83 Geo. L.J. 1849, 1914 (1995). One measure that has been taken by several States, as well as Congress, is to remove from the marketplace an effective tool in child molestation and abuse: realistic-looking (though "virtual") pictures of children engaging in sexually-explicit conduct.

This measure has been taken for two considered reasons. First, it has been shown that pedophiles frequently use such pictures to seduce children. Second, the prohibition of both

actual and computer-generated, virtual child pornography permits law enforcement to prosecute child pornographers effectively. In the absence of a ban, child pornographers could readily evade prosecution by asserting that an actual image of a child is, in reality, a virtual image.

Eleven States currently have statutes that expressly ban computer-generated, virtual child pornography. Ark.Code Ann. § 5-27-605; Del.Code Ann. Title 11 §§ 1103 and 1108; 720 Ill.Comp.Stat. § 5/11-20.1; Iowa House File 327 Seventy-Ninth General Assembly (effective July 1, 2001); Minn.Stat.Ann. § 617.246; Miss.Code Ann. § 97-5-33; Neb.Rev.Stat. § 28-1463.03; Nev.Rev.Stat.Ann. §§ 200.700 and 200.730; N.J.Stat.Ann. § 2C:24-4; N.M.Stat.Ann. §§ 30-6A-2 and 30-6A-3; Va.Code § 18.2-374.1. One State bans computer-generated images that incorporate photographs of children. Kan.Stat.Ann. § 21-3516. Seven States currently have statutes banning pornographic materials that "depict" a child, which can fairly be read to include a computer-generated, virtual image of a child. Ariz.Rev.Stat.Ann. § 13-3553; Ga.Code § 16-12-100; Idaho Code § 18-1507; S.D.Cod.Laws § 22-22-24; Rev.Code Wash.Ann. § 9.68A.060; W.Va.Code § 61-8C-3; Wisc.St.Ann § 948.12. One State has a bill pending in its legislature that would ban computer-generated, virtual child pornography. Fla. Bill No. CS/HB 203. Many other States ban child pornography that portrays an actual child.

These States, in addition to Congress, have come to the measured conclusion that the abolition of both actual and virtual child pornography, depicting children engaging in sexually-explicit activity, is necessary to protect children from unfathomable psychological and physical harm and to facilitate law enforcement. The States would be unable to enforce their bans on child pornography if they were required to establish that the image is actual, not virtual, because the computer technology to create images is so sophisticated that virtual images frequently are indistinguishable to juries, and

even experts, from actual photographs. The faulty reasoning of the Ninth Circuit in *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), threatens the validity of these State statutes and would render enforcement of child pornography laws impossible.

SUMMARY OF ARGUMENT

The Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2252A, 2256, ("CPPA"), fully accords with First Amendment principles. Congress, after considering extensive testimony and documents, found that there is a link between computer-generated, virtual child pornography, of such quality that it is indistinguishable from a depiction of an actual child, and harm to children. It is the considered judgment of Congress that, in order to protect those members of our society who are the most vulnerable and defenseless, the virtual child pornography tool, that has been shown to be used to seduce children and can thwart effective law enforcement, should be banned, even if it arguably is a protected form of speech.

If explicit child pornography, showing virtual children engaging in sexual acts such as sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area," is entitled to any protection under the First Amendment, then such protection is quite minimal. The compelling interest of the government in protecting children from harm, which requires that law enforcement be effective, outweighs any interest of society in such expression. This effort by Congress to protect children is based on a substantial foundation and must be accorded the deference it is due. When the predictive judgment of Congress is given due deference, the CPPA fully accords with First Amendment principles and should be upheld.

ARGUMENT

GIVING DEFERENCE TO THE JUDGMENT OF CONGRESS THAT THE BAN ON VIRTUAL PORNOGRAPHIC IMAGES OF CHILDREN WILL PROTECT CHILDREN FROM HARM AND WILL FACILITATE LAW ENFORCEMENT, THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996 FULLY ACCORDS WITH FIRST AMENDMENT PRINCIPLES.

The CPPA furthers Congress' interest in protecting children from harm with minimal (and tolerable) infringement on speech. It brings within the prohibition of child pornography not only images of actual children but also computer-generated, virtual images "that appear to be" children. 18 U.S.C. §§ 2252A, 2256(8)(B). The words "appear to be" apply to images "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. § 2251, Historical and Statutory Notes, Congressional Findings ¶ (5) ("Congressional Findings"). "Sexually explicit conduct" is defined as actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(A) through (E). Society's interest in material depicting children engaging in sexually-explicit activity is exceedingly low, and is surely outweighed by the compelling interest of the Federal government in protecting the health and welfare of children and facilitating law enforcement. The CPPA furthers those compelling interests in a manner fully in accord with First Amendment principles and should be upheld.

Congress considered extensive testimony and written materials in the course of its consideration of the CPPA. The Senate Judiciary Committee learned that, by use of cheap, readily-available software and scanners, photographs of actual children may be manipulated into sexually-explicit poses and

altered in such a manner that it is no longer possible to determine if the image is of an actual child. Sen. Rep. No. 104-358, IV.B (1996). It learned that child molesters or abusers use child pornography to seduce children into engaging in sexual activity. *Id.* Significantly, it also learned that virtual pictures present the same danger as actual pictures to children who are shown such material in an attempt to seduce them. *Id.*

Pictures are very powerful tools, especially when shown to children. The Senate Judiciary Committee cited a report by Dr. Shirley O'Brien, a psychologist, which indicated that a pedophile generally shows child pornography to his or her victim to educate the child and convince him or her that sexual conduct is acceptable. *Id.* at IV.A. The child, viewing the photograph, learns that other children engage in sexual activity, is desensitized, and lowers his or her inhibitions. *Id.* The child is then more likely to engage in sexual activity. *Id.* Dr. Victor Cline, a clinical psychologist specializing in the treatment of sexual compulsions and addictions, confirmed in his testimony before the Senate Judiciary Committee that pedophiles use child pornography to seduce children and persuade them to engage in sexual acts. *Id.* at IV.B.

The Attorney General's Commission on Pornography also noted this frequent use of child pornography. "Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." 1 Attorney General's Commission on Pornography, Final Report 649 (1986) (footnotes omitted).

Congress was convinced, and found that the image of a child engaging in sexually-explicit activity, shown to the potential child victim, has the effect of breaking down the child's inhibitions so that he or she may believe that such

"fun" activity is performed by other children. Congressional Findings ¶ (3). Significantly, Congress also found that

> the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct.

Congressional Findings ¶ (9).

Further, the new technology for generating virtual child pornography poses insurmountable challenges to law enforcement. Virtual child pornography frequently is indistinguishable from actual child pornography. Congress acknowledged that law enforcement will have difficulty proving that a pornographic image portrays an actual child. Sen. Rep. No. 104-358, IV.A and B. Experts, as well as juries, may find it impossible to determine whether an image is of an actual child or a computer-generated, virtual child. Government would have to locate and produce for the jury an actual child depicted in the photo, a Herculean task that surely would cause further psychological harm to the child. *See id.* at IV.B. These difficulties will only become greater with time, as newer and better versions of the desktop imaging software and scanners become available to child pornographers.

Congress heard testimony to this effect. *See*, *e.g.*, *id.* (the new computer technology provides defendants with "a built-in reasonable doubt standard in every child exploitation/pornography prosecution"). Congress noted that, without a ban on virtual child pornography, "[s]tatutes prohibiting the possession of child pornography produced using actual children would be rendered unenforceable and

pedophiles who possess pornographic depictions of actual children [would] go free from punishment." *Id.*

Congress also sought to encourage persons who possess child pornography to destroy it. *Id.* Since virtual child pornography is indistinguishable from actual child pornography, a person possessing such materials may retain both types, in the absence of any certainty that the pornographic image is entirely computer-generated. *Id.* Congress found that the prohibition on both types of child pornography "will encourage the possessors of such material to . . . destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children." Congressional Findings ¶ (12).

In addition, Congress heard testimony that child pornography whets the appetites of child molesters and abusers, and that virtual child pornography has the same effect in this regard as actual child pornography. Sen. Rep. No. 104-358, IV.A and B. Dr. Cline testified that child pornography "can act as an incitement to imitate it in real life with someone they have access to and can intimidate not to tell." *Id.* at IV.A. According to Dr. Cline, this sexual deviation is a learned behavior; child molesters and abusers use child pornography "to stimulate and whet their sexual appetites which they masturbate to [and] then use later as a model for their own sexual acting out with children." *Id.* The Senate Judiciary Committee also heard testimony that child pornography is "an addiction that escalates, requiring more graphic or violent material for arousal . . . ." *Id.*

Moreover, Congress noted that child pornography, whether actual or virtual, degrades children in general. It found that the depiction of children engaged in sexually-explicit activity "has a deleterious effect on all children by encouraging a societal perception of children as sexual objects

and leading to further sexual abuse and exploitation of them." Congressional Findings ¶ (11)(A).

Congress, hence, made five findings in support of its prohibition on virtual child pornography, each supported by testimony and relevant materials reviewed in the course of its consideration of the CPPA. *See, generally*, Note, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996 -- A Reply to Professor Burke and Other Critics*, 35 Harv. J. on Legis. 245 (1998).

These congressional findings were supported by substantial evidence and are entitled to deference.

> Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

Turner Broadcasting System, Inc. v. F.C.C., *supra*, 520 U.S. at 196. Congress has the responsibility to exercise the legislative power and a Court's obligation, in reviewing legislation, is simply to "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994). Congress, having the inherent flexibility to hear testimony and review writings on policy issues, is "far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon [legislative questions]." *Id.* at 665. Indeed, when regulating child pornography, Congress and state legislatures have "greater leeway" than in other areas touching speech. *New*

York v. Ferber, 458 U.S. 747, 756 (1982). The *amici* States urge the Court to acknowledge Congress' "greater leeway" in its carefully-considered efforts to address the harm caused by child pornography.

In the CPPA, Congress made "predictive judgments" concerning harm to be avoided and remedial measures necessary to achieve its goal. One such judgment is that child pornography, actual or virtual, is used by child molesters and child abusers to seduce children into performing sexual acts. Another judgment is that law enforcement would be unable to effectively prosecute possessors of "actual" child pornography if they have a defense by labeling it "virtual." Both of these judgments closely relate to the harm to children that is to be avoided and to the remedial measure necessary to achieve that end, which is to deny child molesters and abusers a tool used in seduction and to facilitate law enforcement.

Indeed, as noted above, Congress is not the only legislature that has made the predictive judgment that child pornography, whether depicting actual or virtual children, is likely to cause harm to children. Eleven States have also found it necessary to pass laws banning computer-generated, virtual child pornography in order to protect its children. One State has such a bill pending. Eight States have laws banning sexually-explicit "depictions" of children. Each of these States seeks to protect its children from harm in a minimally-intrusive and tailored manner.

The Ninth Circuit found, however, that there is no evidence of harm to actual children from virtual pictures of children engaging in sexually-explicit activity, and so it held that Congress was without power to restrict this speech. *Free Speech Coalition v. Reno*, *supra*, 198 F.3d at 1093. In so finding, the Ninth Circuit failed to accord the predictive judgments of Congress due deference. Congress, after hearing testimony and reviewing relevant materials, found that there is a link between child pornography depicting a

virtual child, that is indistinguishable from a depiction of an actual child, and harm to children. Congressional Findings ¶¶ (3) and (9). The Ninth Circuit, however, re-weighed the material and found to the contrary, substituting its own review of available literature for that of Congress. This was inappropriate.

The First Circuit, in *United States v. Hilton*, 167 F.3d 61, *reh. en banc den.* (1st Cir.), *cert. den.*, 528 U.S. 844 (1999), the Eleventh Circuit, in *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999), and the Fourth Circuit, in *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000), *pet. for cert. pending* (January 21, 2001), have each rightfully concluded that Congress is permitted to ban child pornography, whether actual or virtual, because of the low value of the speech and the great harm to children when such images are used as a tool of seduction. Those Courts of Appeals accorded Congress due deference, balanced the interests appropriately, and correctly found that the CPPA accords with First Amendment principles.

As the First, Fourth, and Eleventh Circuits found, the level of protection afforded by the First Amendment to virtual images of children engaging in sexually-explicit activity such as sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area," is exceedingly low. Naturally, not all speech is entitled to the same level of protection. *See, e.g., Young v. American Mini Theaters*, 427 U.S. 50, 70 (1976) (society's interest in protecting non-obscene, sexually-explicit materials (portraying adults) is "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"). Hence, some utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (discussing lewd and obscene speech).

Indeed, this Court has placed child pornography in the category of less-protected, if not entirely unprotected, speech. *New York v. Ferber*, *supra*, 458 U.S. at 764; *Osborne v. Ohio*, 495 U.S. 103 (1990). The Court in *Ferber* considered a New York statute that prohibited the use of actual children in sexually-explicit performances. It held that child pornography "bears so heavily and pervasively on the welfare of children engaged in its production" that "the balance of competing interests is clearly struck and [] it is permissible to consider these materials as without the protection of the First Amendment." *Ferber*, *supra*, 458 U.S. at 764.

The Court expanded on this, finding in *Osborne*, *supra*, that "encouraging the destruction of these materials is [] desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." 495 U.S. at 111. Hence, protection of actual children depicted in pornographic images is not the only interest that can be considered compelling enough to restrict this type of speech. It is entirely appropriate for Congress to consider harm to all children who are at risk, including those at risk of seduction, and to fashion a remedy to address this harm.

The interest in protecting children from seduction surely is compelling enough to outweigh the minimal societal interest in speech that depicts children engaging in sexually-explicit activity such as sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area." *See Ferber*, *supra*, 458 U.S. at 757-58 (government's interest in "safeguarding the physical and psychological well-being of a minor" is not only compelling, but "constitutes a government objective of surpassing importance"). In addition, the interest in facilitating law enforcement, so that purveyors of actual child pornography, the creation of which abuses children, cannot readily evade prosecution, is similarly compelling.

Accordingly, while the CPPA, like the similar statutes enacted by the States, is content-based, in that it bans the possession of material based on its content and on its effect on viewers (both adult and child), the CPPA, like its State counterparts, survives strict scrutiny review. This Court has not hesitated to find that the destruction of material showing a child engaging in sexually-explicit activity is a compelling governmental purpose, to protect the actual children depicted and also to protect children who may be shown such pictures by child abusers or molesters. *Osborne*, *supra*, 495 U.S. at 111. Virtual child pornography is indistinguishable from actual child pornography and is used by child abusers and molesters to perpetuate their abuse of children in the same manner as depictions of actual children. Thus, the compelling interest in promoting the destruction of child pornography recognized in *Osborne* is present here. Moreover, actual child pornography has no First Amendment protection. *See Ferber*, *supra*, 458 U.S. at 764. Virtual child pornography warrants the same level of protection as actual child pornography. Surely the balance weighs in favor of the governmental interest in this case.

Eleven States, in addition to Congress, have come to the measured conclusion that the abolition of both actual and virtual child pornography, depicting children engaging in sexually-explicit activity, is necessary to protect children from unfathomable psychological and physical harm and to facilitate law enforcement. Both the Federal government and the States would be unable to enforce their bans on child pornography if they are required to establish that the image is actual, not virtual. Society's interest in material depicting children engaging in sexually-explicit activity is exceedingly low, and is easily outweighed by the compelling governmental interest in protecting the health and welfare of children and facilitating law enforcement. The CPPA furthers those compelling interests in a manner fully in accord with First Amendment principles and should be upheld.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed and the Child Pornography Prevention Act of 1996 should be upheld as fully in accord with First Amendment principles.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHN D. ASHCROFT,
ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Petitioners,

v.

THE FREE SPEECH COALITION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* ON BEHALF OF THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN

In support of the Petitioner, John D. Ashcroft, Attorney General

The National Center for Missing & Exploited Children (NCMEC), by its counsel, Dennis DeConcini, Esquire, hereby moves this Honorable Court pursuant to Rule 37(3)(b) and Rule 21 of the Supreme Court of the United States for leave to file a brief as amicus curiae in the matter of John D. Ashcroft, Attorney General vs. The Free Speech Coalition, in order to present argument stating reasons why the relief requested by Petitioner should be granted.

This brief is being filed based upon Rule 10(a) and 10(c) of the Supreme Court of the United States. The United States Court of Appeals for the Ninth Circuit has entered a decision in conflict with the United States Courts of Appeals for the First, Fourth, Fifth and Eleventh Circuits. Moreover, the Ninth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Honorable Court.

The National Center for Missing & Exploited Children occupies a unique role as the official national resource center and clearinghouse congressionally mandated under the Missing Children's Assistance Act of 1984. Additionally, NCMEC has been tasked under federal law to be the repository of all child pornography reports from Electronic Communication Services on the Internet. (Title 42 U.S.C. 13032.) As the official agency for referral to law enforcement for such reports this Court's decision in the case herein will have far-reaching implications for NCMEC operations and responsibilities under federal law.

As an agency which provides training, technical assistance and other related services for the prosecutors, law enforcement, courts, legislators, researchers, treatment professionals, victims and families for whom we were created, NCMEC is in a unique

position to provide the Court with a perspective and argument relevant to the issues of child exploitation and pornography.

The following party, through counsel, has refused to consent to the filing of the attached brief amicus curiae:

The Free Speech Coalition

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The Petitioner has consented to the filing of this brief amicus curiae.

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT..... 5

ARGUMENT 9

A. THE CHILD PORNOGRAPHY PREVENTION ACT PROTECTS BOTH DEPICTED AND NON-DEPICTED CHILDREN FROM THE HARMFUL EFFECTS OF CHILD PORNOGRAPHY IRRESPECTIVE OF THE VISUAL IMAGE PRODUCTION PROCESS 9

1. The Legislative History of The Child Pornography Prevention Act is Clear and Unambiguous Concerning the Harmful Effects that Child Pornography Visits On Non-Depicted Children 9

2. This Honorable Court has Recognized that Congress and the States have a Compelling and Legitimate Interest in Protecting the Psychological, Emotional and Physical Development of Children 12

3. Virtually Indistinguishable Images of Child Pornography are used by Pedophiles and Child Molesters to Sexually Exploit Children Irrespective of the Image Production Process . .15

B. THE DECISION BELOW BY THE NINTH CIRCUIT COURT OF APPEALS WILL IMPOSE A CHILLING EFFECT ON THE INVESTIGATION AND ENFORCEMENT OF LAWS THAT PROTECT CHILDREN FROM SEXUAL EXPLOITATION THROUGH THE USE OF VISUAL DEPICTIONS OF CHILD PORNOGRAPHY 17

1. The Potential Civil Liability for Law Enforcement Agencies, the CyberTipline at the National Center for Missing and Exploited Children and Prosecutors for Authorizing and Executing Search Warrants for "Legal" Visual Depictions of Child Pornography is Significant 17

2. The Burden of Proof on the Government to Prove Beyond a Reasonable Doubt that Photographs, Videos, DVDs and Computer or Electronic Images Transmitted on the Internet Contain Visual Depictions of Actual Children Engaging in Sexually Explicit Conduct without the Limiting Language of "Appears to Be" is Onerous in the Present Technological Environment 19

C. THE CHILD PORNOGRAPHY PREVENTION ACT'S DEFINITION OF CHILD PORNOGRAPHY PROVIDES ADEQUATE NOTICE TO THE ORDINARY CITIZEN OF THE TYPE OF CONDUCT THAT IS PROHIBITED AND DOES NOT ENCROACH ON PROTECTED SPEECH..... 23

1. The Child Pornography Prevention Act Prohibits the Production, Possession or Dissemination of Virtually Indistinguishable Visual Depictions of Child Pornography Whether Produced with Actual Children or through Technology 23

2. Virtual Child Pornography as Defined Under the Child Pornography Prevention Act Cannot Be Legally Distinguished from Categories of Speech to which This Court Historically Has Declined to Provide Constitutional Protection 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases:

Buckley v. Fitzsimmons, 509 U.S. 259 (1993). 19

FCC v. Pacifica Foundation, 438 U.S. 726 (1978). 13

The Free Speech Coalition, et al. v. Janet Reno, 198 F.3d 1083 (9th Cir. 1999). 5, 19

Ginsburg v. New York, 390 U.S. 629 (1968). 13

New York v. Ferber, 458 U.S. 747 (1982). 13, 14, 24, 25

Osborne v. Ohio, 495 U.S. 103 (1990). 12, 13, 24, 25

Prince v. Massachusetts, 321 U.S. 158 (1944). 13

Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180 (1997). 14

United States v. Acheson, 195 F. 3d 645 (11th Cir. 1999). . 25

United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub. nom. United States v. Weigand*, 812 F. 2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987). 25

United States v. George Ervin Fox, Jr., 2001 U.S. App. LEXIS 6234 (5th Cir. 2001). 12, 13, 24, 25

United Sates v. Hilton, 167 F.3d 61 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999). 12, 25

United State v. Knox, 32 F.2d 733 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). 25

United States v. Mento, 231 F.3d 912 (4th Cir. 2000). 25

Constitutional Provisions:

United States Constitution Amendment I 9, 24, 25

Statutes:

18 U.S.C. § 2256 . . . . . 5, 10, 20, 24

18 U.S.C. § 2256 (8)(B) 20

18 U.S.C. § 2256 (8)(D) 20

18 U.S.C.A. § 2251 (West Supp. 1999), Historical and Statutory Notes, Congressional Findings 11

42 U.S.C. §§ 5771-5780 1

42 U.S.C. § 5771(11) 2

42 U.S.C. § 13032. . . . . 2, 18

Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996). 5, 10, 23

Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1977). 10

Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984). 10

Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (1986). 10

Child Abuse Victim's Rights Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341 (1986). 10

Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988). 10

Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990). 10

Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996). 3, 4, 5, 6, 8, 9, 10, 11, 12, 15, 23, 24, 25, 26

Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996). 10

Child Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998). 10

Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (1998). 2, 10

Children's Internet Protection Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000). 10

Court Rule:

Supreme Court Rule 37 (3)(b). 1

Miscellaneous:

Abel, Gene G., et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2(1) Journal of Interpersonal Violence (March 1987). 17

Annual Report of Investigations of the United States Postal Inspection Service (2000). 22

Child Pornography Prevention Act of 1995: Hearings on S. 1237 before the Senate Committee on the Judiciary, 104th Congress, 2d Sess. 36 (1996). 6, 10, 13, 15

Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR 571-72 (American Psychiatric Association 2000). 10

Federal Bureau of Investigation, Innocent Images National Initiative Report, February 5, 2001. 22

Hellwege, Jean, *Law Enforcement, Legislators Grapple with Child Sexual Exploitation on the Net*, 36(3) Association of Trial Lawyers of America 13 (March 2000). 21

Internet Crimes Against Children Task Force Report, Office of Juvenile Justice and Delinquency Prevention (OJJDP), January 2001. 20

Internet Crimes Against Children Task Force, Report to the National Center for Missing and Exploited Children, March 2000. 21

Klain, Eva, Heather Davies and Molly Hicks, *Child Pornography: The Criminal Justice System Response* (National Center for Missing & Exploited Children, March 2001). 8

Lanning, Kenneth V., *Child Molesters: A Behavioral Analysis* (3d ed., National Center for Missing & Exploited Children 1992). 16, 17

Remarks of U.S. Deputy Attorney General Eric Holder, "International Conference Combating Child Pornography on the Internet," Vienna, Austria, September 29, 1999. 7

Statement of Louis J. Freeh, Director, Federal Bureau of Investigation, Before the Senate Appropriations Subcommittee for the Departments of Commerce, Justice and State, the Judiciary and Related Agencies, March 10, 1998. 16

Tyler, R.P. and Lore E. Stone, *Child Pornography: Perpetuating the Sexual Victimization of Children*, 9 Child Abuse & Neglect 313 (1985). 13

INTEREST OF AMICUS CURIAE*

The National Center for Missing and Exploited Children (NCMEC) is a not-for-profit corporation congressionally mandated under the Missing Children's Assistance Act of 1984. NCMEC was established to serve as the official national resource center and clearinghouse. Its mission is to operate a national 24-hour toll-free telephone line for reporting information regarding missing children; coordinate public and private programs to locate, recover, or reunite missing children with their families; disseminate nationally information relating to model programs, services and legislation that benefit missing and exploited children; provide technical assistance and training to federal, state and local law enforcement in locating and recovering missing children, both nationally and internationally; and generally promote awareness about the issues surrounding child abduction and child exploitation. *See generally*, 42 U.S.C. §§ 5771-5780.

NCMEC is at the forefront of national and international child protective efforts. As the nature of technology has evolved and provided those who sexually exploit children more sophisticated and insidious tools to prey on our most vulnerable citizens the challenges of protecting our children have increased in complexity and numbers. The mission and resources of NCMEC have responded to this challenge. In June 1987, Congress gave NCMEC the responsibility for operating the National Child Pornography Tipline, a toll-free telephone number through

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* Counsel for amicus curiae authored the brief in whole, and no other person or entity made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the Petitioner and pursuant to Supreme Court Rule 37 (3)(b). Respondent withheld permission for the filing of this brief.

which individuals can report leads regarding allegations of child sexual exploitation. To date, NCMEC has received and processed more than 8,000 such leads. On January 31, 1997, in response to the increasing prevalence of child sexual victimization, NCMEC officially opened the Exploited Child Unit (ECU). ECU is responsible for receipt, processing, initial analysis and referral to law enforcement of all such information. As technology continued to advance and the use of computers became more prevalent, Congress recognized the need to provide online access to NCMEC's services. On March 9, 1998 NCMEC launched the CyberTipline initiative, www.cybertipline.com, to serve as the national online clearinghouse for investigative leads and tips concerning child pornography, child sexual molestation, child sex tourism, child prostitution, and enticement of children for sexual acts. NCMEC thus became "the 911 of the Internet." 42 U.S.C. § 5771(11). To date, NCMEC and the ECU have received and processed over 40,000 leads through the CyberTipline.

In October 1998, Congress passed the Protection of Children from Sexual Predators Act (PCSPA) which amended, among numerous federal statutes, the Victims of Child Abuse Act of 1990. A new statute enacted as a part of the PCSPA was 42 U.S.C. § 13032, which requires providers of electronic communication services or remote computing services to file a report to the CyberTipline when they obtain knowledge from which a violation of certain child pornography offenses is apparent. To facilitate this new role, NCMEC opened CyberTipline II in February 2001. This initiative provides a mechanism separate from the public reporting mechanism through which electronic communication service providers are required to file their reports under the Act. In response to this latest mandate from Congress, NCMEC anticipates 7,000 to 10,000 reports per week. Obviously, NCMEC's interest in the legal definition

of child pornography is substantial and significant by virtue of its various and unique responsibilities mandated under federal law.

NCMEC provides services to law enforcement, prosecutors, direct-service providers, courts, legislators, educators, researchers, families, and victims from around the world. The Center is electronically linked with missing children's clearinghouses in all 50 states, the District of Columbia, Puerto Rico, the United Kingdom, the Royal Canadian Mounted Police, INTERPOL, and others. The Center's internet website, which is currently viewed 1,500,000 times per day, is linked with hundreds of other websites around the world to provide real-time images of breaking cases involving missing and exploited children. In the past 16 years, NCMEC has actively assisted in more than 75,000 cases involving missing and exploited children, and has aided in the recovery of more than 50,000 children.

NCMEC's interest in the present case is to ensure both the continued effectiveness of legislation designed to protect children from exploitation and abuse associated with child pornography, and the successful prosecution of those who commit crimes involving sexual exploitation against children. The decision below, if affirmed, will permit those who prey on children to *legally* produce, possess and distribute sexually explicit images that are virtually indistinguishable from images of actual children. Not only will this enable continued victimization of actual children and fuel the growth of the child pornography market, but it will severely impair the ability of law enforcement and prosecutors to protect children by enforcing existing laws prohibiting such crimes. The Child Pornography Prevention Act of 1996 ("CPPA") was carefully crafted by Congress to address the latest technology that has resulted in the most insidious form of child pornography to date.

NCMEC is joined in the brief by the Office of Juvenile Justice and Delinquency Prevention's Internet Crimes Against Children Task Force program. In 1998, in an effort to combat the flood of child pornography on the Internet and help prevent computer-assisted exploitation of children, the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP) established ten Internet Crimes Against Children ("ICAC") task forces. That number has now grown to 30 task forces nationwide. ICAC task forces are dedicated to investigating child pornography offenses and offenses involving online enticement of children for sexual acts. Eighty-seven percent of their caseload involves offenses relating to the possession, receipt, production or distribution of child pornography.

NCMEC and the ICAC program have significant interests by virtue of their respective statutory responsibilities and Congressional mandates to support the Constitutionality of the CPPA. Both believe the Act is necessary to meet the unique challenges posed by the proliferation of sophisticated computer technology and its attendant role in the burgeoning child pornography market as well as the sexual abuse of children. NCMEC and the ICAC program posit that the CPPA is a proper regulation of unprotected speech, meets all constitutional standards, and provides adequate protection against arbitrary prosecution. Therefore, for the reasons and arguments set forth herein, the National Center for Missing & Exploited Children as *amicus curiae* hereby supports the position of the United States Department of Justice and urges reversal of the Ninth Circuit Court of Appeals' decision in this case.

SUMMARY OF ARGUMENT

The Child Pornography Prevention Act of 1996 ("CPPA") was enacted in part to address the challenges resulting from the recent dramatic technological advances in the creation, production and transmission of visual images through the computer.[1] Increasingly, graphic software packages and computer animation are being used to manipulate or "morph" images and to create "virtual" images indistinguishable from photographic depictions of actual human beings. This technology, while revolutionizing the computer and entertainment industries, has also breathed new life into the world of child pornography, creating unparalleled challenges to law enforcement officers and prosecutors across the country. There is little argument in the present case that real harm is perpetrated on children who are depicted in child pornography. NCMEC argues that there is compelling evidence that visual depictions of sexually explicit conduct involving children cause real physical, emotional and psychological damage not only to depicted children but also to non-depicted children. Moreover, the intent of Congress was to address that harm through the CPPA.[2]

The CPPA is designed to meet the challenges of recent technological advances by expanding the federal

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[1] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996). The portions of the law at issue here are amendments to the definition of child pornography under 18 U.S.C. § 2256. Other sections of the Act deal with penalties for sexual exploitation of children, changes to the Privacy Protection Act, severability and crossing state lines to engage in sexual acts with children.

[2] Interestingly, the Ninth Circuit in *The Free Speech Coalition, et al. v. Janet Reno,* 198 F.3d 1083 (9th Cir. 1999), dismissed Congress' reliance on the findings from the Final Report of the Attorney General's Commission on Pornography because they predated existing technology. However, in the next breath, the court relied upon that very same Report to conclude that the problem of children being seduced with child pornography is relatively insignificant.

definition of child pornography to include computer-altered and computer-generated visual depictions. Congress determined that such expansion was justified by the State's compelling interest in protecting children from the serious threat that child pornography, real or virtual, poses to their physical and mental health, safety and well-being. The legislative history of the CPPA is replete with clear and unambiguous Congressional intent. Congress offered 13 separate, detailed findings in support of the CPPA.[3] Primary among them is the finding that child molesters and pedophiles frequently use child pornography in the molestation process. Child molesters use child pornography to seduce or entice children to engage in sexual conduct, lower a child's natural inhibitions against having sexual conduct with an adult, and gradually desensitize children to the fear or reluctance they naturally feel upon viewing sexually explicit depictions.[4]

Molesters also use child pornography to stimulate their own desires and fuel their fantasies for children as sexual partners. Viewing these images whets the appetite of the molester and serves as a precursor to his own sexual acts with children. The more frequently a molester views child pornography, the more he, like his child victims, becomes desensitized to the abnormality of his conduct. He can convince himself that his behavior is normal, and eventually he will need more and increasingly explicit child pornography to satisfy his cravings. When mere visual stimulation no longer satisfies him, he will often progress to sexually molesting live children.

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[3] *See* Child Pornography Prevention Act of 1995: Hearings on S. 1237 before the Senate Committee on the Judiciary, 104th Congress, 2d Sess. 36 (1996) [hereinafter 1996 Senate Hearings].

[4] Statement of Dr. Victor B. Cline, 1996 Senate Hearings at 36.

Lack of resources, ever-changing technology and the free flow of information over the Internet have compounded the already daunting responsibility of law enforcement to eliminate child pornography. Use of computer technology to commit child pornography offenses is at an all-time high. Federal prosecutions of Internet child pornographers have increased by 10% every year since 1995, with over 400 cases prosecuted each year in the federal courts alone.[5] Offenders can view and trade child pornography while sitting in the comfort of their homes, an especially attractive option for avoiding detection. Digital technology has enhanced the quality of images available and increased the volume of information that can be accessed. Scanners and inexpensive software packages now allow offenders to create virtual child pornography, which they often trade for more explicit images of real children. The invention of web cameras even allows individuals to molest children in "real time," while others watch from their homes. Child pornographers are always seeking more, and more explicit, child pornography. Virtual child pornography feeds this cycle and sustains the market. As technology continues to become cheaper and more advanced, the volume of child pornography being traded over the Internet will rise exponentially.

Congress found that the effects of child pornography on molesters and child victims are the same, regardless of whether the images are produced using actual child victims, by morphing innocent images of minors with other sexually explicit depictions, or created "virtually" through the use of technology. Likewise, virtual pornography feeds the child pornography market and facilitates its growth, just as pornography involving actual children does.

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[5] Remarks of U.S. Deputy Attorney General Eric Holder, "International Conference Combating Child Pornography on the Internet," Vienna, Austria, September 29, 1999.

Under current law, NCMEC analyzes all reported images of child pornography to determine whether a violation of federal child pornography laws may have occurred, then prioritizes the reports, adds value to the leads and forwards the reports to appropriate law enforcement agencies for investigation. Often there are exigent circumstances surrounding the ongoing victimization of children. Such reports, when received by the CyberTipline, are given priority and accelerated through the system so that timely intervention will halt the further exploitation of a child. Prior to the Ninth Circuit's decision, the standards for determining what is prohibited conduct were clearly established by federal child pornography laws, including the Child Pornography Prevention Act, state statutes and case decisions.[6] If affirmed, the Ninth Circuit decision would impede this referral process by requiring analysts to make a determination as to whether any particular visual depiction involves actual or "virtual" children. Obviously, if the images contain virtual children there will be no exigent circumstances to prioritize. However, if actual children are being exploited, the additional time and expertise needed to reach that determination, if it could be reached at all, would make timely intervention by law enforcement improbable.

Once law enforcement becomes involved, their burden will no longer be limited to determining *prima facie* whether the images are child pornography. It will also require determining whether actual children are depicted, determining the identity of those children, and verifying their locations in anticipation of future testimony. Each defendant is given a built-in defense of reasonable doubt as to the actual existence of the depicted child at each step in that process. These additional burdens imposed by the Ninth

[6] *See* Klain, Eva, Heather Davies and Molly Hicks, *Child Pornography: The Criminal Justice System Response* (National Center for Missing & Exploited Children, March 2001).

Circuit decision are onerous and the obvious difficulties in meeting them render the enforcement of existing child pornography laws practically impossible. Moreover, civil liability exposure for law enforcement in searching and seizing "protected speech" if the visual depictions are not of actual children is significant. Conversely, the failure of law enforcement to intervene in a timely manner when actual exploitation of real children is on-going is equally disturbing.

Child pornography has no value as speech, and no lawful purpose in a civilized society. This Court has correctly held it to be outside the protection of the First Amendment. That determination was based on its lack of value in the market place of ideas and its harm to children, not upon its method of production. Virtual child pornography produces the same harmful effects on non-depicted children that result from actual child pornography. Child pornography is not transformed into protected speech merely because it is produced by a different method (i.e., without actual children). Because all forms of child pornography equally endanger children, all forms of child pornography should be equally prohibited.

ARGUMENT

A. THE CHILD PORNOGRAPHY PREVENTION ACT PROTECTS BOTH DEPICTED AND NON-DEPICTED CHILDREN FROM THE HARMFUL EFFECTS OF CHILD PORNOGRAPHY IRRESPECTIVE OF THE VISUAL IMAGE PRODUCTION PROCESS

1. The Legislative History of the Child Pornography Prevention Act is Clear and Unambiguous Concerning the Harmful Effects that Child Pornography Visits On Non-Depicted Children.

For more than two decades, Congress has been trying to eliminate the scourge of child pornography.[7] Each time Congress passes a law, however, child pornographers find a way around the law's prohibitions.[8] The Child Pornography Prevention Act (hereinafter "CPPA") is one of several federal statutes passed by Congress to protect children form the harmful effects of child pornography.[9] Congress offered thirteen separate, detailed findings in support of the CPPA.[10] Primary among them is the finding that child molesters and pedophiles frequently use child pornography in the molestation process.[11] Child molesters use child pornography

[7] *See supra* note 3, 1996 Senate Hearings.

[8] *See* S. Rep. No. 104-358, at 26.

[9] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1977); Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984); Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (1986); Child Abuse Victim's Rights Act of 1986, Pub. L. No. 99-591, 100 Stat. 3841 (1986); Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996); Child Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998); Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (1998); Children's Internet Protection Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

[10] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, δ121, 110 Stat. 3009 (1996). The portions of the law at issue here are amendments to the definition of child pornography under 18 U.S.C. § 2256. Other sections of the Act deal with penalties for sexual exploitation of children, changes to the Privacy Protection Act, severability and crossing state lines to engage in sexual acts with children.

[11] The term "pedophiles" is used herein to refer to individuals with recurrent sexual fantasies, urges or behaviors involving sexual activity with prepubescent children, as classified in section 302.2 of the *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* 571-72 (American Psychiatric Association 2000). "Child molesters" is used more broadly to refer to individuals who engage in sexual activity with children, whether due to sexual preference or situational factors.

to seduce or entice children to engage in sexual conduct with an adult, and to gradually desensitize children to the fear or reluctance they naturally feel upon viewing sexually explicit depictions.

The legislative history of the CPPA also states that molesters use child pornography to stimulate their own desires and fuel their fantasies for children as sexual partners. Viewing these images whets the appetite of the molester and serves as a precursor to his own sexual acts with children.[12] The more frequently a molester views child pornography, the more he, like his child victims, becomes desensitized to the abnormality of his conduct. He can convince himself that his behavior is normal, and eventually he will need more and increasingly explicit child pornography to satisfy his cravings. When mere visual stimulation no longer satisfies him, he will often progress to sexually molesting actual children.

Congress found that when child pornography is "used as a means of seducing or breaking down a child's inhibitions," the images of child pornography are equally as effective regardless of whether they are photographs of real children or computer-generated pictures that are "virtually indistinguishable."[13]

[12] Although both men and women molest children, studies indicate that women constitute a much smaller percentage of the offender population. *See* Adam M. Tomison, Update on Child Sexual Abuse, 5 Issues in Child Abuse Prevention (Summer 1995). For ease of reference, this brief therefore uses the masculine tense when discussing the child molester.

[13] *See* 18 U.S.C.A. § 2251 (West Supp. 1999), Historical and Statutory Notes, Congressional Findings at 8 [hereinafter "Congressional Findings"].

2. This Honorable Court has Recognized that Congress and the States have a Compelling and Legitimate Interest in Protecting the Psychological, Emotional and Physical Development of Children from the Harmful Effects of Child Pornography.

In *Osborne v. Ohio*, this Court also addressed the harmful effects that child pornography inflicts on non-depicted children. 495 U.S. 103, 110-111 (1990). The Court indicated that when considering the issue of prohibiting the possession of child pornography, it could consider the harm to non-depicted children when child pornography is used to seduce or coerce them into sexual activity. *Id.* at 111. Thus the Court stated that protecting children who are not actually pictured in the pornographic image is a legitimate and compelling state interest. *Id.* Under the rationale in *Osborne*, this Court must consider justifications for such harm to non-depicted children. *See Id.* at 110-111. *See also United Sates v. Hilton*, 167 F.3d 61, 70 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999); *United States v. George Ervin Fox, Jr.*, 2001 U.S. App. LEXIS 6234 (5th Cir. 2001).

This Court has also recognized that states have a legitimate interest in destroying the child pornography market. *Osborne*, *supra*, at 110. In enacting the CPPA, Congress declared that the statute would encourage people to destroy all forms of child pornography, thereby reducing the market for the material. Congressional Findings at 12. The decision in *Osborne* and the attendant reasoning provided a solid foundation for the Congressional Findings and legislative history that support the clear Congressional intent in enacting the CPPA. The reasoning of the Court in *Osborne* and the testimony of witnesses forming the basis for the Congressional Findings supporting the CPPA are seamless. This Court clearly stated, "It is evident beyond the

need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor is compelling'" (*New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *see also Osborne, supra,* at 109), while Congress agreed that "[c]hild molesters who possess child pornography in *any form* use such material to facilitate the seduction of new victims."[14] Perpetuating the victimization of children is the most insidious purpose of child pornography.[15]

Congress once again determined to undertake its lawful duty to protect the psychological, emotional, and physical development of the nation's children. As this Court has stated, "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Ferber*, *supra*, at 757. Therefore, this Court has declared that it "will generally sustain legislation aimed at protecting the physical and emotional well-being of children even when the laws...operate in sensitive areas." *Id.* This Court has acknowledged the compelling governmental interest in stamping out child pornography at all levels. *Osborne*, *supra*, at 110. It has also acknowledged that as times change, efforts that were once effective to combat this "vice" are no longer sufficient. *Id.*; *see also United States v. Fox*, *supra*, at 19. This Court has always given Congress and the States greater leeway to meet threats when the protection of children is at stake, even when constitutionally protected rights are involved. *Osborne*, *supra*, at 108-111; *New York v. Ferber*, *supra*, at 756. *See also FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Ginsburg v. New York*, 390 U.S. 629 (1968); *Prince v.*

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[14] Statement of Dr. Victor B. Cline, 1996 Senate Hearings at 36 (emphasis added).

[15] R.P. Tyler and Lore E. Stone, *Child Pornography: Perpetuating the Sexual Victimization of Children*, 9 Child Abuse & Neglect 313, 316 (1985).

Massachusetts, 321 U.S. 158 (1944). Furthermore, the Court has stated:

> In reviewing the constitutionality of a statute, "courts must accord substantial deference to the predictive judgments of Congress." Our sole obligation is "to assure that, in formulating its judgements, Congress has drawn reasonable inferences based on substantial evidence." We owe Congress' findings deference in part because the institution "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions. This is not the sum of the matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 195-96 (1997); *see also Ginsberg*, 390 U.S. at 643 (stating that courts do not demand of legislatures "scientifically certain criteria of legislation").

Moreover, there is no protected right in this case. There is only the compelling governmental interest in protecting children from what this very Court has termed as an "evil." *Ferber*, 458 U.S. at 763-64. Technology and the

Internet have advanced the use and production of child pornography in ways that were not available in 1982 or even in 1990. If we are to achieve progress in attacking the growing problem of child pornography and its resulting harms, we must be prepared to adapt our responses to meet this very real threat in a world of "virtual realities."

3. Virtually Indistinguishable Images of Child Pornography are used by Pedophiles and Child Molesters to Sexually Exploit Children, Irrespective of the Image Production Process that Creates the Visual Depictions.

To the child viewer being drawn into sexual activity with an adult, child pornography involving virtual children is just as effective as that which is created using real children, as it is virtually indistinguishable to the eye.[16] The only conclusion to be drawn from an objective study of the testimony contained within the Congressional Findings and legislative history of the CPPA is that Congress intended to prohibit images created solely with technology that are virtually indistinguishable from images depicting real children. The intent of Congress is clear and unambiguous. The purpose of the CPPA is to protect children from the very harmful effects of child pornography, irrespective of whether real children or "virtual children" are used in the production of the child pornography.

Child pornography is the criminal instrument of the child molester. The cycle begins when the molester shows a potential victim child pornography to "educate" the child. Children, especially young children, viewing pornography for the first time will be confused or perhaps frightened by what they see. Child molesters and pedophiles use child pornography to lower the victim's inhibitions about sex and

[16] Statement of Dr. Victor B. Cline, 1996 Senate Hearings at 36.

convince the child that the activities he or she sees are "normal." Once the child overcomes any reluctance to the idea of sex, the molester attempts to convince the child that sex between children and adults is also normal and that other children participate. The molester may even persuade the victim that such conduct is enjoyable. In fact, many of the children who are depicted in child pornography were themselves seduced into the activity.[17] It is for this reason that they often appear to be laughing, smiling or having a good time. Peer pressure is a powerful force for children.[18] Once a child sees that other children are involved, and that they seem to be happy, he or she can more easily believe that the activity is acceptable.

For child molesters, particularly pedophiles, child pornography "comes to represent their most cherished sexual fantasies."[19] Most have collections, although they vary by offender in size and content. While there are some collectors who merely fantasize about the material without acting out those fantasies, most use it for arousal as a prelude to sexual activity with children.[20]

As noted earlier, each child victim potentially becomes the subject of additional child pornography that is used to seduce yet more children. Very rarely will an offender have only one victim. The Federal Bureau of Investigation estimates that the average child molester will victimize more than seventy children throughout his lifetime.[21] This number can be much higher for true

[17] Lanning, Kenneth V., *Child Molesters: A Behavioral Analysis* 25 (3d ed. National Center for Missing & Exploited Children 1992).
[18] *Id.* at 28.
[19] *Id.* at 23.
[20] *Id.* at 28.
[21] Statement of Louis J. Freeh, Director, Federal Bureau of Investigation, Before the Senate Appropriations Subcommittee for the Departments of Commerce, Justice and State, the Judiciary and Related Agencies, March 10, 1998.

pedophiles.[22] While it is important not to confuse the mere possession of child pornography with the separate issue of causation in abuse, experience proves that there is a significant likelihood that a person in possession of child pornography will also be involved in sexually abusing children. It is self-evident that the effects and uses of child pornography are not altered in the slightest manner if the visual depictions in the child pornography are virtually indistinguishable, whether real or virtual children are depicted.

B. THE DECISION BELOW BY THE NINTH CIRCUIT COURT OF APPEALS WILL IMPOSE A CHILLING EFFECT ON THE INVESTIGATION AND ENFORCEMENT OF LAWS THAT PROTECT CHILDREN FROM SEXUAL EXPLOITATION THROUGH THE USE OF VISUAL DEPICTIONS OF CHILD PORNOGRAPHY

1. The Potential Civil Liability for Law Enforcement, the CyberTipline at the National Center for Missing & Exploited Children and Prosecutors for Forwarding or Authorizing and Executing Search Warrants for "Legal" Visual Depictions of Child Pornography is Significant.

The decision by the Ninth Circuit Court of Appeals effectively legalizes the possession of visual depictions of

[22] *See* Abel, Gene G., et al., *Self -Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2(1) Journal of Interpersonal Violence (March 1987) (concluding that pedophiles who target young boys outside the home have an average of 150.2 victims). *See also* Lanning, *supra* note 17, at 17.

child pornography that are virtually indistinguishable from child pornography produced with actual children. If this decision is affirmed the practical considerations for law enforcement agencies and prosecutors are profound.

The CyberTipline at the National Center for Missing and Exploited Children has been mandated by Congress to receive all reports of apparent child pornography from Internet Service Providers and Remote Computing Service stations (hereinafter "electronic communication service providers"). 42 U.S.C. § 13032. Reports of apparent child pornography are forwarded to NCMEC, where trained analysts triage the images and assign a priority value to the report. The reports are then made available to appropriate law enforcement agencies for investigation as designated by the Attorney General of the United States.

Law enforcement receives leads on potential violations of statutes prohibiting the possession, sale, production or transmission of visual depictions of child pornography from a variety of sources. However, under the Ninth Circuit ruling, a determination of whether the children depicted in the apparent child pornography are actual children or virtual children would need to be made prior to establishing probable cause to make a referral or file a supporting affidavit for a search warrant, subpoena or other due process instrument. In the real world of Internet crimes investigation, if such a determination could be made at all, the probability that such evidence is still at the original target location is at best, minimal.

Moreover, if the visual depictions in the video, photographs or other electronic media demonstrate on-going sexual exploitation of a child requiring immediate response and intervention from law enforcement to prevent further exploitation of the depicted child, how is law enforcement to

react? Present reactive protocols mandate law enforcement to execute a search warrant or proceed under an exigent circumstances exception to protect the child victim. If the decision below is affirmed, law enforcement may arrive at the target site and seize what turns out to be "legal"—i.e., virtual—child pornography. What would be the resultant civil exposure of law enforcement for the search and seizure of "protected speech"? Conversely, what would be the civil liability of law enforcement for not responding in a timely manner due to an inability to determine whether actual or virtual children are depicted and whether actual children were being molested?

Prosecutors labor under a different challenge that is no less egregious. Supervising the execution of the search and seizure of such evidence described above exposes the prosecutor to civil liability under a qualified immunity analysis. *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

2. The Burden of Proof on the Government to Prove Beyond a Reasonable Doubt that Photographs, Videos, DVDs, and other Computer or Electronic Images Transmitted on the Internet Contain Visual Depictions of Actual Children Engaging in Sexually Explicit Conduct is Onerous.

Perhaps the most concerning aspect from the Ninth Circuit decision is how it exacerbates the prosecutorial burden of proving the image in question is a real child, not just a visual depiction that "appears to be" a child. *The Free Speech Coalition, et al. v. Janet Reno,* 198 F.3d 1083 (9th Cir. 1999).

Without the language "appears to be" written into the statute, there is a built-in reasonable doubt argument that the child does not actually exist unless the government can

identify the actual child involved. *See* 18 U.S.C. § 2256 (8)(B); 18 U.S.C. § 2256(8)(D). This onerous burden would in effect make the successful prosecution of the sexual exploitation of children in the context of child pornography highly problematic.

The proliferation of child pornography on the Internet has resulted in the creation of numerous law enforcement efforts to combat such exploitation. In 1998, in an effort to combat the flood of child pornography on the Internet and help prevent computer-assisted exploitation of children, the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP) awarded $2.4 million in grants to ten state and local law enforcement agencies nationwide to create Internet Crimes Against Children ("ICAC") task forces.[23] In both 1999 and 2000, ten additional grants were awarded, bringing the total number of ICAC task forces to 30 nationwide.[24] ICAC task forces are dedicated to investigating child pornography offenses and offenses involving online enticement of children for sexual acts. They are designed as primarily pro-active operations, focusing on prevention and interception of would-be offenders. However, due to the sheer numbers of cyber-tips that the ICAC task forces receive, they are often forced to be reactive in investigating child pornography offenses. To date, the ICAC program is responsible, either directly or indirectly by assisting a sister agency, for 493 arrests.[25] Of that number, 87% were for offenses relating to the possession, receipt, production or distribution of child pornography.

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[23] Press Release, *Justice Department Awards Grants to Combat Internet Crimes Against Children,* Office of Justice Program News, September 16, 1998.

[24] Press Releases, *Deputy Attorney General Announces New Grants to Combat Internet Crimes Against Children,* Office of Justice Programs News, December 17, 1999 and May 10, 2000.

[25] Internet Crimes Against Children Task Force Report, Office of Juvenile Justice and Delinquency Prevention (OJJDP), January 2001.

Data compiled by the ICAC task forces conclusively establishes that individuals involved with child pornography are likely to molest children. At the end of 2000, the Pennsylvania-based ICAC task force reported that 51% of offenders arrested for pornography-related offenses were definitively determined to be actively molesting a child or children or to have molested in the past.[26] These determinations resulted from investigations that revealed a victim, self-identification by the victim post-arrest, confirmation of the subject's prior criminal history, or an admission to prior child molestation in a forensic interview with law enforcement. Other task forces reported similar results. The ICAC task force based in Dallas, Texas, reported that 32% of offenders arrested in the last 12 months for child pornography offenses were determined to be molesting currently or to have molested in the past.

These innovative task force units, designed specifically to operate on the front lines of the war against child pornography and sexual exploitation, are in the best possible position to document the prevalence of child sexual abuse among child pornographers.

In addition, the Federal Bureau of Investigation's Crimes Against Children Program initiated its "Innocent Images" operation in 1995 to focus exclusively on child pornography offenses and child sexual exploitation through use of computers and the Internet. In its first year, the program generated just over 100 cases.[27] However, between

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[26] Internet Crimes Against Children Task Force, Report to the National Center for Missing and Exploited Children, March 2000.

[27] Hellwege, Jean, *Law Enforcement, Legislators Grapple with Child Sexual Exploitation on the Net,* 36(3) Association of Trial Lawyers of America 13 (March 2000).

1996 and 2000 the number of new cases jumped from 113 to 1,541, an increase of 1,264%.[28]

Furthermore, since the passage of the Child Protection Act of 1984, the United States Postal Inspection Service has conducted 3,827 child exploitation investigations, resulting in 3,367 arrests for using the mail in violation of child pornography statutes.[29] The United States Customs Service is responsible for enforcing the law regarding international child pornography offenses. Customs operates the Child Pornography Enforcement Program and the Cybersmuggling Center. Since 1992, the United States Customs Service is responsible for the arrest of more than 1,000 individuals for child pornography-related offenses.[30]

Law enforcement agencies in all fifty states are joining forces to overcome legal and jurisdictional issues and ensure vigorous investigation and prosecution of child pornography offenses.[31] Such cooperative and multijurisdictional efforts clearly demonstrate the "nexus" between child pornography and the sexual exploitation of real children for which the Ninth Circuit Court of Appeals searched unsuccessfully. If the decision below is affirmed, the work of both law enforcement and prosecutors will be severely compromised in the battle against those who would sexually exploit children through child pornography.

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[28] Federal Bureau of Investigation, Innocent Images National Initiative Report, February 5, 2001.

[29] Annual Report of Investigations of the United States Postal Inspection Service at 24.

[30] Press Release, *U.S. Customs Arrests Oklahoma City Child Pornographer*, U.S. Customs Service, February 9, 2001.

[31] *See, e.g.*, Press Release, *Cornyn Lauds New Internet Crime-Fighting Partners: Joins Forces with Dallas Internet Crimes Against Children Task Force*, Office of the Attorney General, State of Texas, October 11, 2000; Strausberg, Chinta, *Illinois Attorney General Moves to Secure Internet Abuses*, Chicago Defender, February 21, 2000.

C. THE CHILD PORNOGRAPHY PREVENTION ACT DEFINES CHILD PORNOGRAPHY IN A MANNER THAT PROVIDES ADEQUATE NOTICE TO THE ORDINARY CITIZEN OF THE TYPE OF CONDUCT THAT IS PROHIBITED AND DOES NOT ENCROACH ON PROTECTED SPEECH

1. The CCPA Prohibits the Production, Possession, or Dissemination of Virtually Indistinguishable Visual Depictions of Child Pornography Whether Produced with Actual Children or through Technology.

A close and objective reading of the legislative history, Congressional Findings and testimony before the Senate Committee for the Judiciary the enactment of the CPPA reveals a clear and unambiguous intent to prohibit child pornography that actually depicts real children or is virtually indistinguishable from visual images that depict real children.[32]

The holding in the Ninth Circuit allows for the lawful possession of visual depictions of "speech" (child pornography) that has been historically prohibited by Congress and this Court. The targeted visual depictions are not cartoons, drawings or other artistic efforts that do not result in sexually explicit depictions of children. It is clear Congress did not intend the CPPA to cover such efforts. The CPPA does not prohibit the visual depictions of adults in sexually explicit conduct or poses. Its application is not "arbitrary or discriminatory" but is narrowly tailored to

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[32] Omnibus Consolidated Appropriations Act of 1997, *supra; see also* 1996 Senate Hearing, 104th Congress, 2d session, on S. 1237, *supra.*

prohibit only those images that are or appear to be child pornography.

In support of this position the Court should consider that the prosecutor must prove the case against the defendant by using the same objective evidence used prior to the enactment of the CPPA. Usually, a medical expert would testify as to the age of the child depicted in the image(s) based on a sexual maturation scale, the experience and training of the expert and other relevant and material evidence probative on the issue of the range of age evidenced in the image. This is standard protocol for the prosecution of such cases. Moreover, there is an affirmative defense available to the accused if the image actually depicts an adult at the time the image was created. Finally, the prosecutor must prove beyond a reasonable doubt the accused knowingly acted in violation of the statute. *See generally*, 18 U.S.C. § 2256.

It is a logical and permissible extension of the rationales of *Ferber* and *Osborne* to allow the regulation of sexual materials that appear to be of children but do not, in fact, involve the use of live children in their production. *United States v. Fox,* 2001 U.S. App. LEXIS 6234 (5th Cir. 2001).

2. Child Pornography as Defined under the CPPA, Whether Involving Actual or "Virtual Children," Cannot be Distinguished from Categories of Speech to which this Court Historically has Declined to Provide Constitutional Protection under the First Amendment.

The First Amendment to the Constitution does not protect all speech. Speech must have some socially redeeming value to warrant Constitutional protection.

Obscenity, fighting words, and child pornography are all historical examples of speech that this Court has declined to provide such protection. *Osborne v. Ohio, supra*; *New York v. Ferber, supra; see also*, *Roth v. United States*, 354 U.S. 476, 484 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73 (1942). The definition of child pornography and thereby the attendant standards for investigation and prosecution of related criminal conduct are well settled. *United State v. Knox*, 32 F.2d 733 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub. nom. United States v. Weigand*, 812 F. 2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987). The argument that the CPPA criminalizes thoughts is without merit. Here, as *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), *United States v. Acheson*, 195 F. 3d 645 (11th Cir. 1999), *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000), and *Fox*, 2001 U.S. APP. LEXIS 6234, "the state does not rely on a paternalistic interest in regulating the viewer's mind. Rather [Congress] has enacted [the CPPA] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." *See Osborne*, 495 U.S. at 109 .

Child pornography has no social value, whether produced with real children or otherwise. The process of production is relevant only to punish the additional harm it brings real children, either in the production itself or to non-depicted children harmed in other ways. In the final analysis, the use of the end product to exploit children is how this "speech" should be judged. As such, the visual depictions of child pornography as defined under the CPPA are without the protection of the First Amendment and are the appropriate target of government regulation, to the point of extinction.

CONCLUSION

Child pornography is one of the most insidious traps confronting children in this country. Not only are children victimized when they are depicted in child pornography, but research and experience also tells us that child molesters and pedophiles actively use child pornography in the process of molesting children. When they are not molesting children, these child predators use child pornography to satisfy their sexual desire for children, thereby perpetuating their predatory lifestyle.

From the perspective of law enforcement, child pornography continues to be a serious challenge. The only possible solution in effectively combating the rising tide of the sexual exploitation of children is for legislatures to enact statutes that recognize changing developments in technology and the enhanced criminal capabilities that evolve in a dynamic environment.

The Court of Appeals for the Ninth Circuit has failed to grasp the compelling justification for the prohibitions set forth in the CPPA. Despite overwhelming evidence and reason, the majority below could not find the nexus between child pornography and child molestation. However, after clear and objective analysis of the statute, the methods and motives of child molesters, and the insidious use of technology to perpetrate crimes against children, the depth of the victimization of children becomes obvious. The Child Pornography Prevention Act's definition of child pornography, to include visual depictions that "appear to be" or "convey the impression of" minors engaging in sexually explicit conduct is in all respects Constitutional.

Accordingly, the National Center for Missing and Exploited Children urges the reversal of the Ninth Circuit

Court of Appeals decision below consistent with the dissenting opinion therein.

Respectfully submitted,

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No. 00-795

In The Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, *ET AL.*,
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v.

FREE SPEECH COALITION, *ET AL.*,
RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, NATIONAL COALITION FOR THE PROTECTION OF CHILDREN & FAMILIES, AND THE FAMILY RESEARCH COUNCIL, IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, NATIONAL COALITION FOR THE PROTECTION OF CHILDREN & FAMILIES, AND THE FAMILY RESEARCH COUNCIL, IN SUPPORT OF PETITIONERS

Amici Curiae, the National Law Center for Children and Families, the National Coalition for the Protection of Children and Families, and the Family Research Council, hereby move this Honorable Court for an order, pursuant to Rule 37(b), granting leave to file the attached BRIEF *AMICI CURIAE* in support of Petitioners.

Consent was granted by Petitioners and withheld by Respondents.

The National Law Center for Children and Families (NLC) is a Virginia non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States and in several foreign countries.

The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses.

NLC has filed numerous friend of the court briefs in this Court and in other federal and state cases involving First Amendment issues, including; *Alexander v. United States*,

509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *Knox v. United States*, 510 U.S. 939 (1993), *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), and *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), and *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for magazines harmful to minors); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996) (computer BBS obscenity); and *Free Speech Coalition v. Reno*, N.D. Cal. (1997), unpublished, No. C97-028SC, 1997 WL 487758, and Ninth Circuit No. 97-16536, 198 F.3d 1083 (9th Cir. 1999) (computerized child pornography, 18 U.S.C. 2252A). NLC's Counsel of Record herein was also trial and appeal counsel for the Department of Justice, Child Exploitation and Obscenity Section, in *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), and NLC's co-counsel herein was also on the brief in the Fifth Circuit in that case.

The National Coalition for the Protection of Children & Families (formerly known as "N-CAP" or the National Coalition Against Pornography) is a national public education and citizen advocate organization that works to increase public awareness of the harm caused to the American family by obscene, indecent, and other pornographic and harmful materials. The Coalition is active at local and national levels, both in this country and in countries around the world, in its efforts to educate the public on the harms which illegal, violent, and degrading pornography inflicts upon children and families.

The Coalition has formed local and regional citizen organizations in communities across the Country in order to bring local and national leadership to this important issue and operates a Model Cities America program to foster participation by community, civic, religious, and business

leaders to assist public officials and law enforcement efforts to improve and enforce existing laws against unlawful pornography and sexually oriented business activities. Its Chairman is the Reverend Dr. Jerry Kirk and its President is Frederic R. Schatz, M.B.A.

The Coalition is also an affiliate of the Religious Alliance Against Pornography ("RAAP"), which is an international organization of church and religious leaders to educate people about the destructive influence of pornography and its offense to public morality, private virtue, and religious principles. The co-chairmen of RAAP are His Eminence William Cardinal Keeler, Archbishop of Baltimore, and the Reverend Dr. Kirk.

Family Research Council, Inc. (FRC) is a non-profit organization acting as a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues that affect American families. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy initiatives to preserve and protect the family, and has particular knowledge about the harms of child pornography and the sexual exploitation of children that will be helpful to the Court in this case.

FRC has filed *amicus curiae* briefs involving First Amendment issues in this Court and in federal and state appellate courts including: *Alliance For Community Media, et al., v. FCC, No. 95-227 (consolidated with Denver Area Educ. Telcoms. Consortium, Inc. v. FCC,* 518 U.S. 727

(1996)(cable indecency); *ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (Communications Decency Act, "CDA")*; *ACLU v. Reno*, 217 F.3d 162 (3rd Cir. 2000), *cert. petition pending*. FRC's Senior Director of Legal Studies, co-counsel herein, has also filed briefs involving First Amendment issues with this Court, *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 520 U.S. 1117 (1997) (material harmful to minors); and in federal and state appellate courts: *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996) (material harmful to minors); *State v. Stoneman*, 323 Ore. 536; 920 P.2d 535 (1996)(child pornography); *People v. Wiener*, 29 Cal. App.4th 1300 (1994) (obscenity).

These organizations and/or their counsel herein were active in advising Members of Congress on the Child Pornography Prevention Act and provided testimony to the Senate Hearing on the CPPA. These *amici curiae* have a committed interest in supporting the constitutionality of the Act in the careful and narrowed way intended by Congress and wish to provide arguments to the Court in this regard.

For these reasons, we pray that this Honorable Court grant this Motion for Leave and accept the attached Brief.

Respectfully submitted,

J. Robert Flores
Counsel of Record

No. 00-795

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JOHN ASHCROFT, ATTORNEY GENERAL
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**BRIEF *AMICI CURIAE* OF THE
NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES,
NATIONAL COALITION FOR THE PROTECTION OF
CHILDREN & FAMILIES, AND THE
FAMILY RESEARCH COUNCIL,
IN SUPPORT OF PETITIONERS**

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE CPPA IS A CONSTITUTIONALLY VALID ACT OF CONGRESS THAT SERVES A COMPELLING INTEREST IN PROTECTING REAL CHILDREN FROM SEXUAL ABUSE AND EXPLOITATION 5

A. The Early History of Federal Investigative Efforts to Combat Child Pornography Demonstrates the Dynamic Nature of the Child Pornography Trade 5

B. The CPPA is a Necessary Tool to Protect Children in an Environment Where Technology Threatens the Government's Entire Effort to Protect Children from Sexual Exploitation. 7

C. The Findings of Fact and Committee Report Specify that the CPPA is Directed at the Narrow Category of Child Pornographic Material that is Not Protected Speech 11

D. The Court of Appeals Clearly Erred in its Finding that there is No Constitutionally Compelling Interest Furthered by the Act 15

II. The 1996 Act Constitutionally Prohibits Traffic Only in CHILD PORNOGRAPHIC MATERIAL WHICH IS INDISTINGUISHABLE IN ITS APPEARANCE AND USE FROM ACTUAL DEPICTIONS OF REAL CHILDREN AND IS NOT CONSTITUTIONALLY VAGUE OR OVERBROAD. 16

A. The CPPA is a Narrowly Tailored Law that is Necessary to Further a Government Objective of Surpassing Importance. 16

B. The Government's compelling Interest in Proscribing Material from Commerce that Appears to be Actual Child Pornography, or Which is Realistic and Pandered as Such, is Fully Supported by this Court's Precedent. 19

C. The Clear Language of the CPPA Specifies that, Where Material Using Adults in the Role of Children for Literary or Artistic Reasons is not Pandered as Child Pornography, The Act Does Not apply. 20

III. THE GOVERNMENTS OF GREAT BRITAIN AND CANADA ENACTED LEGISLATION PARALLEL TO CPPA. 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Atkins v. Director of Public Prosecution, 2 All ER 425, 1 WLR 1427 (Queen's Bench, Div. Ct., 8 March 2000) (LEXIS:UK cases) 26

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 18

Chaplinski v. New Hampshire, 315 U.S. 568 (1942) 19

Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999) 4, 15

Free Speech Coalition v. Reno, N.D. Cal. No. C 97-0281 SC (8-12-97), 1997 WL 487758 4

Ginzburg v. United States, 383 U.S. 463 (1966) 26

New York v. Ferber, *458 U.S. 747 (1982)* ..... *5, passim*

Osborne v. Ohio, 495 U.S. 103 (1990) 6, 15, 25

Regina v. Sharpe, No. 27376, 2001 S.C.C.D.J. 42, 2001 Can. Sup. Ct. Lexis 8 27

St. Martin's Press v. Carey, 605 F.2d 41 (2d Cir. 1979) 17

United States v. Acheson, 195 F.3d 645 (11th Cir. 1999) 3

United States v. Hilton, 167 F.3d 61 (1st Cir. 1999) ..3, 21, 24

United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995) 8, 10, 20

United States v. Mento, 231 F.3d 912 (4th Cir. 2000) 4

United States v. Pearl, 89 F. Supp.2d 1237 (D. Utah 2000) 4

STATUTES

18 U.S.C. § 2251 3

18 U.S.C. § 2252 3

18 U.S.C. § 2252 (a)(4) 7

18 U.S.C. § 2252A 2, 3, 18, 21,22

18 U.S.C. § 2256 ..... 2, 3, 21, 23

OTHER

Senate Report, S. Rep. No. 104-358 .....2, passim
Senate Hearing, Child Pornography Prevention Act of 1995: Hearing before the Senate Comm. On the Judiciary, 104th Cong. 2d Sess. (June 4, 1996).....2, 8, 11, 27
Statement of Deputy Chief Postal Inspector Jeffrey Dupilka, Senate Hearing on CPPA, June 4, 1996.....8
Statement of Deputy Assistant Attorney General Kevin DiGregory, Senate Hearing on CPPA, June 4, 1996 9
Statement of Bruce A. Taylor, National Law Center for Children and Families, Senate Hearing on CPPA, June 4, 1996 11

INTEREST OF *AMICI CURIAE*

Your *amici curiae*, the National Law Center for Children and Families, of Fairfax, Virginia, the National Coalition for the Protection of Children & Families, of Cincinnati, Ohio, and the Family Research Council, of Washington, D.C., are non-profit educational and public interest organizations with historically active roles in America's state and federal efforts to enact valid laws regulating obscenity, child pornography, indecency, materials that are harmful to minors or obscene for minors, and to educate public officials, law enforcement officers, and the public on the just and fair enforcement of such laws and on the harmful effects of such materials on society and individual victims. The commercial and public circulation of pornographic images of children is the most extreme form of the "crass commercial exploitation of sex" and your *amici* share the concerns of Congress and the public in defending the necessity and constitutionality of the Child Pornography Prevention Act of 1996 ("CPPA") and hereby present arguments that were reflected in the Act and may not otherwise be presented to the Court by the parties.[1]

The National Law Center for Children and Families (NLC) also filed briefs *amicus curiae* in both the District Court for the Northern District of California and in the Court of Appeals for the Ninth Circuit below.

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[1] This Brief *Amici Curiae* was authored in whole by Counsel of Record J. Robert Flores and co-counsel Bruce A. Taylor of the National Law Center for Children and Families, with contribution by co-counsel Janet M. LaRue of Family Research Council, and no part of the brief was authored by any attorney for a party. No person or entity other than these *amici curiae*, their members, or counsel, made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

SUMMARY OF ARGUMENT

The CPPA, 18 U.S.C. § 2252A, was enacted to address the Government's compelling need to protect children by maintaining its ability to investigate and prosecute actual child pornography, as well as graphic images that are virtually indistinguishable from actual child pornography and pose the same real dangers to children.

Publicly available computer and photo imaging technologies had progressed to the point that images could be altered or wholly created without an actual minor performing the sexual conduct, but which appear to viewers to be actual photos of real children engaging in sex. Such counterfeit child pornography presents a clear and present danger to real children by inciting pedophiles to molest and seducing children into abuse. These were the inescapable realities resulting from the legislative record assembled by Congress in 1995-96. *See* SENATE REPORT to accompany S. 1237, S. Rep. No. 104-358; CONGRESSIONAL FINDINGS for Pub. L. 104-208, Title 1, § 121, preamble to S. 1237, reported as annotations to 18 U.S.C. § 2251; and testimony at the Senate Hearing of June 4, 1996, *Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996).

The CPPA addressed this threat to minor children and to the Federal statutory scheme by prohibiting the interstate and foreign shipment, distribution, receipt, reproduction, sale, and possession of "child pornography" where "such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct." 18 U.S.C. §§ 2252A, 2256 (8)(B). The CPPA also prohibits traffic in "child pornography" where "such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. §§ 2252A, 2256 (8)(D).

Congress found these modernizations necessary to protect children in the Internet age. These *amici* submit that the Act is constitutionally valid under the First Amendment.

These *amici* submit, as a primary factor in CPPA's constitutionality, that § 2252A only prohibits knowing traffic in that type of "child pornography" under § 2256 (8) that is indistinguishable from actual photographic child pornography. In other words, only images that are or appear to have been produced in violation of § 2251 and contraband under § 2252 are "child pornography" under § 2252A.

Congress made this legislative intent explicit in narrowing the scope of the Act, as written and as it must be authoritatively construed, to apply only to the distribution, receipt, and possession of such realistic "counterfeit," "synthetic," or apparently authentic "virtual" child pornography that it appears to be an actual child being sexually exploited or abused or conveys the impression that it is an actual child subjected to sexually explicit conduct. The act of knowingly distributing or possessing such real or apparently authentic child pornographic images is not speech entitled to protection under the First Amendment and Congress may declare such materials contraband and banned from the streams of interstate and foreign commerce.

The CPPA has been upheld by four courts against the same challenges that have been raised in this case. The Court of Appeals for the First Circuit ruled in *United States v. Hilton*, 167 F.3d 61, 65 (1st Cir. 1999): "We hold that the law, properly construed, survives Hilton's facial constitutional challenge. It neither impinges substantially on protected expression nor is so vague as to offend due process." The Court of Appeals for the Eleventh Circuit ruled in *United States v. Acheson*, 195 F.3d 645, 648 (11th Cir. 1999): "[W]e hold the CPPA puts a reasonable person on notice of what conduct it prohibits, is not substantially overbroad, and does not run afoul of the First Amendment." The U.S. District Court for the District of Utah held in

United States v. Pearl, 89 F.Supp.2d 1237, 1246 (D. Utah 2000): "Having carefully considered the Circuits' split of authority on the issue of the constitutionality of the CPPA on the issues of vagueness and overbreadth, this court concludes that the rationale contained in *Hilton* is persuasive. This court concludes, in agreement with *Hilton* and *Acheson*, for the reasons stated therein, that the CPPA is not overbroad." Finally, the Court of Appeals for the Fourth Circuit also considered and rejected the Ninth Circuit's opinion in the instant case and held in *United States v. Mento*, 231 F.3d 912, 923 (4th Cir. 2000): "We hold that the CPPA does not impermissibly regulate protected speech and does not, therefore, offend the First Amendment."

Amici contend that this Court should reverse the Ninth Circuit and uphold the Act. *Amici* agree with the holdings in the other circuits, with the decision of the District Court below, *Free Speech Coalition v. Reno*, N.D. Cal. No. C 97-0281 SC (8-12-97), 1997 WL 487758, as well as the dissenting opinion of Judge Ferguson of the Ninth Circuit: "In sum, the CPPA is not, as the majority claims, an attempt to regulate 'evil ideas.' Instead, the CPPA is an important tool in the fight against child sexual abuse. The CPPA's definition of child pornography provides adequate notice of the type of images that are prohibited and does not substantially encroach on protected expression. Accordingly, I would find the CPPA constitutional." *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1103-04 (9th Cir. 1999) (Ferguson, J., dissenting).

ARGUMENT

I. THE CPPA IS A CONSTITUTIONALLY VALID ACT OF CONGRESS THAT SERVES A COMPELLING INTEREST IN PROTECTING REAL CHILDREN FROM SEXUAL ABUSE AND EXPLOITATION.

A. The Early History of Federal Investigative Efforts to Combat Child Pornography Demonstrates the Dynamic Nature of the Child Pornography Trade.

For more than twenty years, federal and state efforts have been directed against the scourge of child sexual abuse and exploitation through child pornography. Since that time, the original federal law has been amended ten times, in response to decisions of this Court and the recognition by Congress that individuals intent on harming children had identified apparent or actual loopholes in the laws. A review of some of these changes and their causes are instructive of the challenge faced by Congress to protect our children and justify the purpose of Congress in amending those laws, both in the past and in the instant case.

In the seminal case concerning the constitutionality of prohibiting the knowing distribution of child pornography, *New York v. Ferber*, 458 U.S. 747, 749 (1982), this Court, a generation ago, was already aware that "the exploitive use of children in the production of pornography has become a serious national problem." In upholding the New York law, the Court identified several state interests that were both compelling and vindicated by allowing "the States ... greater leeway in the regulation of pornographic depictions of children." *Id.* at 756. These interests include: "safeguarding

the physical and psychological well being of a "minor;"[2] "[t]he prevention of sexual exploitation and abuse of children;" [3] closing "the distribution network for child pornography;"[4] and, minimizing the economic motives that constitute "an integral part of the production of such materials."[5] These findings formed the basis of the Court's holding that child pornography "is not entitled to First Amendment protection." *Ferber* at 765.

In spite of the Court's clear statement that criminal sanctions may be imposed on child pornography regardless of its obscenity, the demand for this material continued to grow. By 1988, law enforcement was investigating the use of computers to facilitate the distribution of child pornography. Producers and distributors of child pornography embraced the technology early, as both a networking tool and a means of distributing child sex images. Congress responded by passing the Child Protection and Obscenity Enforcement Act of 1988 (Pub. L. No. 100-690), amending 18 U.S.C. § 2251-56, to specifically prohibit the use of computers to transport child pornography.

The next challenge confronting prosecutors on the federal level and in many states involved an inability to prosecute individuals for simple possession of child pornography. This loophole meant that the compelling government interest "to stamp out this vice at all levels in the distribution chain," could not be accomplished without prohibiting private possession. *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

In *Osborne*, at 110-111, this Court upheld Ohio's possession law against First Amendment and overbreadth challenges, for the reasons that the "ban on possession and viewing encourages the possessors of these materials to

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[2] *Ferber*, at 756,757
[3] *Id.* at 757.
[4] *Id.* at 759.
[5] Id at 761.

destroy them" and because "pedophiles use child pornography to seduce other children into sexual activity".

Following *Osborne*, Congress enacted the Child Protection Restoration and Penalties Enhancement Act of 1990, adding 18 U.S.C. § 2252 (a)(4) to prohibit possession of three or more items of child pornography. The pedophile community again sought out opportunities to evade the law. The newsletter of the North American Man/Boy Love Association pointed out that possession of one or two publications would not trigger federal law and provided a roadmap to their readers on evading the law. *See* NAMBLA Bulletin, March 1991, vol. 12, no. 2, p. 8. In 1998, Congress changed the possession sections to prohibit any one piece of child pornography. *See* Pub. L. No. 105-314.

By 1990, the statutory scheme prohibiting a broad spectrum of activity involving production, possession, and distribution of child pornography appeared complete. Aggressive state and federal investigative and prosecution efforts were making a substantial impact on domestic traffic in child pornography and increasing child safety as a result.

B. The CPPA is a Necessary Tool to Protect Children in an Environment Where Technology Threatens the Government's Entire Effort to Protect Children from Sexual Exploitation.

In 1991, law enforcement witnessed the child pornography underground embrace computer technology with startling speed. To address this situation, the United States Customs Service in 1993 initiated "Operation Long Arm" to identify individuals in the United States who were using foreign-based computer Bulletin Board Systems to import child pornography. This change from physical movement of materials and people to electronic distribution of child pornography anywhere in the world without having

to cross borders, pick up mail, leave one's home, or meet face-to-face, radically changed the nature of the investigation and prosecution of such cases. Congress recognized that the ability of law enforcement and the courts to identify child pornography involving the actual abuse of children was becoming technically dated and that a modernization of federal law was necessary to provide the same protections for minor children as the prior law sought to provide under the previous state of technology.

In 1995, the newest national investigative program, FBI's "Innocent Images," executed over one hundred search warrants throughout the United States on a single day. The operation focused on the use by pedophiles of the world's largest interactive computer service, America Online, to trade child pornography, stalk children for sex, and network with other pedophiles. That task force continues to handle several hundred investigations. The recent explosion of the use of online systems having global reach via the Internet, World Wide Web, and Usenet represents the gravest challenge to law enforcement's efforts to protect children from sexual exploitation and abuse.

As the methods used to transmit and traffic in child pornography have changed, so has the nature of the material itself. Most of the prior child pornography confiscated up until the mid-1990's appeared to have been created in the 60's, 70's, and 80's, as determined from hair, clothing, and decorating fashions widely used during those decades. Since the pedophile underground moved their operations to the Internet and commercial online services, however, an increasing amount of online child sex material has been newly created, making it more difficult for law enforcement to find the original of an image from an old magazine or the original media and creation methods used.[6] The problems

[6] *See* Statement of Deputy Chief Postal Inspector Jeffrey Dupilka, p. 4, Senate Hearing on CPPA, June 4, 1996.

posed by this new electronic pedophile network are obvious and Congress acted to combat these problems in a reasonable, necessary, and limited fashion in CPPA.

These changes in the child pornography trade required law enforcement to adapt existing techniques, create new ones, and watch as prior law enforcement successes were undone.[7] Illustrative of the hard lessons learned is the case of *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995). In that case, the defendant challenged his "Long Arm" conviction for domestic possession and foreign importation of child pornography on several grounds, including a challenge to the authenticity of the computer downloaded images as provable photographs of real children engaging in the sex acts. Defendant contended, "that the depictions had been altered and were not of actual children." *Id.* at 733.

At trial, Defendant Kimbrough introduced expert opinion from a computer image technician that there existed widely available computer software and hardware that could be used to alter images so that they would appear to be children and/or allow the creation of entirely computer generated images of children. *See* Testimony of Kyle Hargrove, *U.S. v. Kimbrough*, N.D. Tex. No. 1-93-CR-031-01-C, Transcript at 288-93, 308-09, where the defense witness stated:

> Computer imaging technology is generally available, including scanners to turn visual images into digital files capable of being altered by computer and software available for $100.00 to $550.00; *Tr.* at 289-90.
>
> "[J]ust a few hours basic training, self-taught training using a tutorial that is supplied with [image altering software], ... anybody with a basic computer knowledge could learn"; *Tr.* at 299.
>
> Software exists which allows individuals to accomplish age regression or progression; *Tr.* at 291-92.

[7] *See* Statement of Deputy Assistant Attorney General Kevin DiGregory, p. 14, Senate Hearing on CPPA, June 4, 1996.

> Even pixel level examination may not discover such manipulation or generation, *i.e.* there may be insufficient detail to discern telltale signs. *Tr.* at 308-09.

This defense claim was not based on an examination of the Government's evidence of child pornography recovered from defendant, but rather, was offered as a type of *de facto* "reasonable doubt" defense. Moreover, the claim was all the more difficult to disprove because the defendant was not claiming that he had altered or generated the alleged child pornography, but that others may have. *Tr.* at 319-20. He thus challenged the nature of the photographs, as well as the requisite scienter. *Kimbrough*, 69 F.3d at 733.

In the *Kimbrough* case, the jury accepted the Government's evidence that the photos were real before being uploaded onto the computer BBS, from both the forensic exam of the images and because the federal agents were able to find old magazines that showed the identical source photographs and the Court of Appeals was able to affirm the trial court's finding that the Defendant knowingly imported actual child sex photos of real minors. *Id.*

The Government's ability to disprove the assertion that the children depicted do not really exist but are computer altered or created images was disappearing. As new child pornography, which post-dates the widespread availability of computer technology that allow the creation of seamless and indistinguishable images, is created, there would be a built-in argument for reasonable doubt in every case. This is the loophole closed by Congress in CPPA, and not an expansion of child exploitation laws to include previously serious and presently serious works of art or literature or works of political or scientific value. Prosecutors would have been forced to identify the child who is being sexually exploited in the challenged depiction, a virtually impossible task, especially when depictions of foreign children are used. Without CPPA to add a child pornography statute to

compliment the prior child exploitation statute, technology would have helped protect a pedophile who rapes and then photographs children far from home, since it is unlikely that state or federal law enforcement could mount national and international searches and find the children exploited in every case. *See* S. REP. No. 104-358.[8]

C. THE FINDINGS OF FACT AND COMMITTEE REPORT SPECIFY THAT THE CPPA IS DIRECTED AT A NARROW CATEGORY OF CHILD PORNOGRAPHIC MATERIAL THAT IS NOT PROTECTED SPEECH.

The Findings of Fact in the preamble of the Act set forth Congress' intents and purposes in enacting CPPA. These Findings are the conclusions of Congress after input from various public and private entities and a hearing supporting the need for the Act. Moreover, the accompanying SENATE COMMITTEE REPORT provides additional and important contextual material, which not only underscores the Findings, but belies Respondents' allegations of possible overbreadth. Thus, the Findings of Fact and the SENATE REPORT provide a context to evaluate Respondents' claims.

Specifically the Findings of Fact reveal CPPA's focus on the impact new technologies have on sexual exploitation of children. *See* S. REP. at 2-3 and annotations to § 2251 (for reprint of Act's Findings). The SENATE REPORT, at 7, begins with a clear explanation of the Purpose of the CPPA:

> This legislation is needed due to technological advances in the recording, creation, alteration, production, reproduction, distribution and transmission of visual images and depictions, particularly through the use of computers. Such technology has made possible the production of visual

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[8] *See also* Statement of Bruce A. Taylor, National Law Center for Children and Families, pp. 9-10, 37, Senate Hearing on CPPA.

depictions that appear to be of minors engaging in sexually explicit conduct that are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct. Child pornography, both photographic and computer-generated depictions of minors engaging in sexually explicit conduct, poses a serious threat to the physical and mental health, safety and well-being of our children. In addition, the development of computer technology capable of producing child pornographic depictions virtually indistinguishable from photographic depictions of actual children threatens the Federal Government's ability to protect children from sexual exploitation and the production, distribution and possession of materials produced using minors engaging in sexually explicit conduct.

Thus, CPPA is directed at digital images that pose the same threat to children as photography involving actual children or material which is pandered as actual child pornography.[9] Viewed against this backdrop, it is reasonable

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[9] Congress was correct to prohibit traffic in these four forms of such child pornography: that which is (1) true child pornography (actual minors engaging in actual sexual conduct); (2) synthetic or counterfeit child pornography (computer or artificially created images that are so realistic and authentic in appearance that they appear to be of actual minors engaging in actual sexual conduct); (3) composite or morphed child pornography (images using parts of an actual child's image and combining or altering it to create another image showing that child's face or body engaging in sexual conduct); and (4) realistic, but fraudulent child pornography (adult sex materials that were pandered in their promotion or distribution so as to be taken as or considered to be child sex images). All four of these types of child pornography pose the same threat and risk to actual children in the present and

to consider child sex images to be "real child pornography," whether those images are produced with a camera's eye or a computer's brain. Both actual and counterfeit child pornography will pass for the real thing and incite pedophiles to molest and children to be victims.

If the pedophile and the child victim cannot tell the difference, there is no difference in the effect conveyed, and the knowing act of disseminating and collecting images that the distributor or possessor believes are real is a form of conduct not to be protected under the First Amendment. This Court should conclude that the actions of those who knowingly engage in producing, distributing, or collecting such child sex images are not engaged in protected expression and that their actions sexually exploit and harm children and that the tools of that unprotected activity are contraband as "child pornography."

With improvements to the new technologies available to create material which is indistinguishable from photographic child pornography, and the marketing, use, and creation of deceptively life-like materials intended to feed pedophile lusts, the problem will continue to be exacerbated, requiring concomitant changes in law and law enforcement. Moreover, the harms caused by actual child pornography will now be perpetrated by the counterfeit/synthetic/morphed types of child pornography. Legal distinctions between these types becomes irrelevant as the practical differences disappear when technology makes it possible to fabricate child sex images that are as life-like and life threatening as original photos of child sexual abuse. Today, readily

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future, since they would all have the same seductive effect on children and the same incitement effect on pedophiles. None of these materials has serious literary, artistic, political, or scientific purpose and none is "speech" entitled to First Amendment protection when balanced against the compelling interest in preventing its contribution to child sex abuse and exploitation.

available and inexpensive computer software elevates cut-and-paste morphing and photo editing to a techno-art form, which can be difficult to discern even with careful expert examination. Present technology is improving to the point where even careful expert examination may not be sufficient to detect an expert forgery.

The material encompassed by the CPPA is a powerful criminal tool in lowering inhibitions of children. As recognized in the SENATE REPORT, at 13-14:

> A child who may be reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photos, can sometimes be persuaded to do so by viewing depictions of other children participating in such activity. Child molesters and pedophiles use child pornography to convince potential victims that the depicted sexual activity is a normal practice; that other children regularly participate in sexual activities with adults or peers. Peer pressure can have tremendous effect on children, helping to persuade a child that participating sexual activity such as that depicted in the material is "all right."

This type of morphed material is much more than mere "erotica," as previous "cut-and-paste" efforts were. It is what it appears to be, child pornography, especially to the pedophile who creates, uses, or collects it. The pandering of such material to children, other pedophiles, or to the child pornography underground as a whole cannot be permitted if there is to be any hope of stopping the explosion of child sexual exploitation and abuse. Your *Amici* submit that the evidence and legislative bases are conclusive that the risk to children from the creation, distribution, and possession of such material is real, extremely grave, and a clear and present danger, thus justifying this enactment.

D. THE COURT OF APPEALS CLEARLY ERRED IN ITS FINDING THAT THERE IS NO CONSTITUTIONALLY COMPELLING INTEREST FURTHERED BY THE ACT.

The Ninth Circuit read the seminal decision of this Court in *Ferber* to identify a *single* compelling interest justifying the exclusion of child pornography from First Amendment protection. According to the Court below, this interest exists only where "actual children are involved in the illicit images either by production or depiction." *Free Speech Coalition,* 198 F.3d at 1095. *Amici* agree with the dissent that the Court below ignored "that the Supreme Court has already endorsed many of the justifications Congress relied on when it passed the CPPA." *Id.* at 1099 (Ferguson, J., dissenting).

In addition to misreading the pronouncements of the Court in *Ferber* and *Osborne,* the Court of Appeals dismissed the Congressional Findings of Fact, which not only constitute a major part of the legislative history, but were passed as part of the CPPA and constitute the primary statement of Congressional intent and purpose.

Amici submit that the Congressional Findings include justifications that were recognized by this Court as compelling (*i.e., Osborne*, at 111, n. 7) and include findings that link computer-generated images with harm to real children (a nexus even the Court of Appeals admits would allow "the law … to withstand constitutional scrutiny," *Free Speech*, at 1094.) *See* COMMITTEE REPORT, S. REP. No. 104-358, at 2-3. For example, Finding (6), recognizes the reality, based on legislative hearings, that current technology allows the alteration of child pornography depicting real children to preclude identification as either real or a specific child. S. REP. at 2. It also finds the ability of such technology to "alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct." *Id.*

Based upon the testimony of experts, the Congress also found that the child pornography within reach of the statute

would result in its use to "seduc[e] or break[] down the child's inhibitions to sexual abuse or exploitation." S. REP. at 2. The use of virtual images will also contribute to "the market for the sexual exploitative use of children." *Id.* at 3. Perhaps most importantly, the Congress recognized that "the sexualization and eroticisation of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them." S. REP. at 2.

Amici contend that the Court of Appeals created a false standard to be required of Congress before it can act even in an area where it has "greater leeway." *Ferber* at 765. *Amici* respectfully pray that this Court reject the Ninth Circuit's substitution of its own unsupported conclusions for the documented legislative findings of the Congress.

II. THE 1996 ACT CONSTITUTIONALLY PROHIBITS TRAFFIC ONLY IN CHILD PORNOGRAPHIC MATERIAL WHICH IS INDISTINGUISHABLE IN ITS APPEARANCE AND USE FROM ACTUAL DEPICTIONS OF REAL CHILDREN AND IS NOT CONSTITUTIONALLY VAGUE OR OVERBROAD.

A. THE CPPA IS A NARROWLY TAILORED LAW THAT IS NECESSARY TO FURTHER A GOVERNMENT OBJECTIVE OF SURPASSING IMPORTANCE.

The CPPA is narrowly tailored to enable the Government to "prevent ... sexual exploitation and abuse of children," which this Court recognized as a "government objective of surpassing importance." *Ferber*, 458 U.S. at 757.

The Free Speech Coalition claims that the CPPA is unconstitutionally overbroad. Since the Act applies to only a specifically limited category of child images, its prohibitions do not apply to Respondents' adult pornography traffic, as

they described their own activities and works, and no overbreadth exists as to them. *See Ferber*, at 767.[10]

The two main arguments submitted by *Amici* are that the CPPA is not unconstitutionally vague or overbroad and is supported by a rational and compelling governmental purpose, because it prohibits only an unprotected, narrowly defined category of visual materials. The Act does only that which is needed to solve a specific, serious technological and legal problem. By it's plain terms, the law prohibits traffic only in child pornography that was either real and prohibited by pre-existing law or is such a realistic counterfeit that it appears, under the circumstances, to be of an actual minor engaging in sexually explicit conduct. If the material is not "real" or does not appear to be "real" under the circumstances, then it is not prohibited from the streams of commerce. The new law neither "bans" the use of "young looking adults" in pornographic movies such as Plaintiffs-Respondents claim to produce (though they could still be obscene under other state or federal laws), nor prohibits the use in legitimate "Hollywood" movies of underage actors in non-sexual scenes or the use of young looking adults as "body doubles" in simulated sex/nudity scenes.

Furthermore, the new provisions are so easy to avoid violating that no one can validly claim to be self-restraining any legitimately valuable work. To avoid application of the new law, all one need do is use adults in visual depictions of explicit sexual conduct (as per existing law) and not "pander" the sexual activities of "young looking adults" as being actual sex acts by actual minors. Respondents' claim that they comply in this regard. Hollywood complies in this regard. Only a pedophile or child pornographer would have

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[10] *See also St. Martin's Press v. Carey*, 605 F.2d 41, 44 (2nd Cir. 1979, where a challenge to New York's law was dismissed for lack of justiciable case or controversy, since there was no threat of prosecution of "Show Me!" as child pornography.

an interest in representing a picture or computerized image that appears to be of a child as being "real" child porn. If the image appears to be computer generated, if it is an obvious fake that does not fool the naked eye, then CPPA does not apply to its transportation/possession, even if "pandering" is fool heartedly attempted. Hollywood studios and even those who produce "adult" pornography don't represent their "young looking adults" to be minors engaging in illegal sex depictions. If they did or do, then such conduct should not be protected. Since there has been no allegation or evidence in this case submitted or argued by Plaintiffs-Respondents to indicate that they violate the Act, there is no record of any "overbreadth" to protected expression, real or substantial, as would be required by *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep"). Any hypothetical arguments that CPPA will unconstitutionally chill protected expression are not only outside the plain meaning and clearly stated intent of the Act, they are even less worthy of concern and even more *de minimis* than the hypotheticals rejected by the Supreme Court in *Ferber*, 458 U.S. at 773-74.

Amici submit that it is unfair and unreasonable to now ask this Court to presume the federal courts will interpret and apply § 2252A in an unintended and overbroad manner. This Court, as did the District Court below, should uphold the Act's plainly legitimate proscriptions on child pornography that is made to look or pandered as real, as this Court also did in *Ferber*, where it held, at 74:

> Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, [New York's law] is "not substantially overbroad and ... whatever overbreadth may exist should be cured through

> case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

B. The Government's Compelling Interest in Proscribing Material from Commerce that Appears to be Actual Child Pornography, or Which is Realistic and Pandered as Such, is Fully Supported by This Court's Precedent.

In *Ferber*, at 754, quoting *Chaplinski v. New Hampshire*, 315 U.S. 568, 571-72 (1942), the Court began by reminding that limitations on speech have long been recognized:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene .... It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

In so doing, the Court reemphasized that governments are entitled to protect public order and safety and noted the test for determining that materials fall outside First Amendment protection when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake." *Ferber* at 763-64. With the advent of new technologies that did not exist when the Court decided *Ferber*, the Government was and is faced with an overwhelming evil that threatens the safety of children.[11]

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[11] The Congressional Findings of Fact set forth, among others, the following threats to children: (1) new photographic and computer imaging technologies make it possible to produce visual depictions

Appellees argue that the Act should not apply whenever sexual material does not portray actual children. *Amici* contend that Appellees' argument would create one of the most pernicious effects of realistic synthetic material - that computerized child porn images could undermine the entire Governmental effort to protect children. In fact, experts on the enforcement of child pornography laws testified in the hearing before the Senate that pedophiles were already trying to use the gap in the old child pornography statutes to defend their trade in sexual depictions of actual children. *S. REP.* at 15-20. *See also Kimbrough*, 69 F.3d at 733.

C. THE CLEAR LANGUAGE OF THE CPPA SPECIFIES THAT, WHERE MATERIAL USING ADULTS IN THE ROLE OF CHILDREN FOR LITERARY OR ARTISTIC REASONS IS NOT PANDERED AS CHILD PORNOGRAPHY, THE ACT DOES NOT APPLY.

Amici contend that the plain language of the statute makes clear that the Act is not applicable to depictions of adult sexuality or depictions of adults cast to represent the role of minors where the fact of the adult actor's majority is not hidden or the material is not pandered as real child

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of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children; (2) child pornography, whether real, produced using new technologies, or material pandered as child pornography may be used to seduce, overwhelm, or overcome the resistance of children whether the material consists of photographic depictions of actual children or visual depictions produced wholly or in part by new technologies or other means; (3) a pedophile's sexual appetite is stimulated and whetted just as effectively whether the material is real or simulated if he does not know the difference; and (4) the potential of harm to children increases as the amount of child pornographic materials increases.

pornography. Section 2252A only prohibits traffic in materials which are real or appear to be real, and are intended to appear as real pictures of the sexual exploitation of children. Both of these forms of "child pornography" sexually exploit and present a clear and present danger to actual children, a harm the Government has a compelling interest in proscribing. As *Ferber* recognized that "real" child porn is a crime scene photo that damages that child, this Court in *Osborne*, at 111 and n. 7, recognized that the existence of child pornography poses a threat to children because it incites pedophiles to molest and seduces children into becoming victims. *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999). In this regard, child pornography is not only a crime scene photo of yesterday's molestation, it is a criminal tool for tomorrow's abuse. Since that which is real or appears so real that it is indistinguishable from the real thing will have the same effect on pedophiles and child victims, both types of authentic or counterfeit images are equally unprotected and Congress can prohibit traffic in both (like similar laws for drugs, currency, and other contraband).

The CPPA, contrary to Respondents' conclusory allegations, is directed at and applies only to the following materials and activities under 18 U.S.C. § 2256 (8):

> (A) The production, distribution, or possession of a visual depiction which was created by using an actual minor engaging in sexually explicit conduct;
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> (B) The production, distribution, or possession of a visual depiction which is, or appears to be, of an actual minor engaging in sexually explicit conduct;
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> (C) The production, distribution, or possession of a visual depiction which was created, adapted, or modified to appear to be an identifiable minor engaging in sexually explicit conduct; and
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> (D) The advertising, distribution, promotion, presentation, or otherwise pandering of material in such a manner as to convey the impression that it

really is a visual depiction of an actual minor engaging in sexually explicit conduct.

In each case, the focus is either on material which is created as a result of child sexual abuse or which conveys the impression that it was so created. In either event, the resulting material is "child pornography" to pedophiles and becomes both incitement and tool for the sexual abuse and exploitation of actual children – a form of conduct and unprotected material which Congress has a right and a duty to prohibit. This Court has a similar right and obligation to interpret this law so that only this type of child pornography is known to fall within the legitimate scope of the CPPA. Furthermore, this Court has the ability and the duty to so construe and declare that § 2252A is constitutional in this respect and that it goes no further, thus saving the CPPA as constitutional and narrowed to the constitutionally permissible limits that Congress intended.

The duty of federal courts to construe a federal law within constitutional limits so as to save it was recognized in *Ferber*, at 769 n. 24: "When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limited construction."

Respondents argue that the terms "appears to be a minor" and "in such a manner that conveys the impression that the material is or contains a visual depiction of a minor" are facially vague. This argument, however, fails to account for the Congressional Findings of Fact that are part of the Act. *Amici* contend a person of ordinary intelligence can comprehend the terms and affirmative defenses to the statute as excluding speech that enjoys constitutional protection. Congress anticipated the objections now asserted and the Act was written and intended to eliminate such unconstitutional applications, thus leaving a fully constitutional statute, both

on its face and as applied, which this Court can and should uphold within these proper limitations.

The CPPA, 18 U.S.C. § 2256 (8) (A-D), defines "child pornography" by describing the types of material prohibited without any reference to content, ideas, or message. The Act does not contain any language that premises the legality of a particular depiction upon what it communicates. For example, subsection (B) prohibits such depictions regardless of whether they are done to advance either an anti-child pornography position or a pro-pedophile agenda. It does not bar such visual depictions on the basis that they merely offend the sensibilities of "some" adults. Viewpoint, composition, artistic merit, or opinion are not mentioned or included. Instead, subsection (B) affects only material that "appears to be" actual child pornography.

Though the Act's language is sufficiently clear, the types of visual depictions covered by the term "appears to be" is also explained in the Congressional Findings as images which are "*virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.*" S. REP. at 2 (emphasis added).

Congress included the affirmative defense to assure that speech that does not fit the statute remains lawful unless it violates pre-existing laws. For example, a legitimate movie of *Romeo and Juliet* could imply that teen lovers engaged in sexual activity, but use adult stand-ins to simulate those sequences, and the studio would not imply or advertise that the nude scenes were actually being performed by underage actors and the credits would identify both the minor lead actors as well as the body doubles. The studio would not pander the nude scenes as child pornography and would not violate the Act because the Act would not apply. It is conceivable, however, that a pedophile could fraudulently pander an out-take as real child sex scenes in an attempt to

trade it with other pedophiles or seduce a child victim. *Hilton, supra.*

If an artist, regardless of intent, created an obvious drawing or painting of sexual activity portraying minors, such work would fall outside of the Act's reach. If it were a sculpture, it would appear to be a statue, not a picture. Thus Donatello's or Michaelangelo's *David*, are not child pornography for that reason. Likewise a photo of those statues or the paintings of cherubs on the Sistine Chapel are not child pornography. Also, a reasonable person would not consider such non-prurient, artistic nudity to be a "lascivious" or "lewd" exhibition of the genitals. As this Court noted in *Ferber*, at 775, Congress may, to vindicate its compelling interest in protecting children from sexual abuse and exploitation, "forbid ... attempts to render the portrayal somewhat more 'realistic'...". The Act's lack of interest in content, viewpoint, ideas, or messages is not only clearly evidenced by the lack of any normative or value-laden language, but also by the stated purpose of the Act. Respondents argue that the "primary" purpose behind the "appears to be" and "conveys the impression" provisions is to prohibit child pornography, even when it does not depict actual children because it "stimulates the sexual appetites and encourages the activities of child molesters and pedophiles, who use it to feed the sexual fantasies." S. REP. at 25, 36-38. *Amici* submit that this is only one of the legitimate rational bases for the Act. *Amici* further submit that other interrelated and context sensitive purposes of the Act (*see* Congressional Findings and SENATE REPORT), include the "technological advances ... [which] ma[ke] possible the production of visual depictions that appear to be of minors engaging in sexually explicit conduct which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct". S. REP. at 7. Congress found that, because of the many criminal uses to which the new type of

computerized child pornography can be put, it contributes to the overall growth of the illicit and dangerous trade in child pornography. The Act was a necessary tool to "encourage the possessors of such material to rid themselves of or destroy the material thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative uses of children." S. REP. at 3, ¶ 12.

Amici submit that real *and* realistically synthetic child pornography pose clear and present dangers to society by equally inciting molesters to crimes against minor children. *See Osborne*, 495 U.S. at 111, and n. 7. Again, if the pedophile being aroused and the child being seduced do not know the difference, there is no difference. Material which everyone knows is of adults is not at issue. As Dr. Victor Cline testified to the Senate Hearing on CPPA, S. REP. at 13:

> [P]edophiles ... use child pornography and/or create it to stimulate and whet their sexual appetites which they masturbate to then use later as a model for their own sexual acting out with children. ... The man always escalates to more deviant material, and the acting out continues and escalates despite very painful consequences. With a large majority of them an underlying thread is the use of child, adolescent, or adult pornography to stimulate appetite and provide modes of sexual abuse as well as be used as tools to seduce new victims. In my experience, it's the child pornography that is the most malignant.

Section 2252A prohibits trafficking in realistic material pandered to convey the impression that minors are engaging in sexually explicit conduct. What is prohibited is not a message or idea, or even the material itself in all circumstances, but using the streams of commerce to pander counterfeit material as if it were, in fact, actual child pornography. Just as a pornographer made his otherwise

non-obscene material "non-mailable" by his pandering advertisement scheme in *Ginzburg v. United States*, 383 U.S. 463, 475-76 (1966), so can a pedophile or child pornographer make his own conduct unlawful by misusing the facilities of interstate or foreign commerce and fraudulently misrepresenting his wares. Pandering such fraud is an act, not protected speech, and can be and should be made unlawful, as was done in this Act.

The CPPA should be upheld as facially valid. The restrictions do not compromise the discussion of mere ideas or the distribution of truthful, serious communications. What it seeks is to prohibit individuals from knowingly adding to the trade in child pornography where images that appear to be child pornography, whether by design or subterfuge, harm the Nation's children. *Amici* submit this rationale is sufficient to reverse the decision below.

III. The Governments of Great Britain and Canada Enacted Legislation Parallel to CPPA.

The United States is not alone in its efforts to deal with the production, distribution, and possession of computer-generated or morphed child pornography. The governments of Great Britain and Canada had enacted statutes similar to CPPA in their efforts to deal with the new technologies.

Great Britain

In 1994, the British Parliament enacted the Criminal Justice and Public Order Act of 1994 (CJPOA), amending the Protection of Children Act of 1978 to prohibit production and distribution of "any indecent photograph or pseudo-photograph of a child."[12] The Act also amended Section 160

[12] See *Atkins v. Director of Public Prosecution*, 2 All ER 425, 1 WLR 1427 (Queen's Bench, Div. Ct., 8 March 2000) (LEXIS: UK Cases), upholding the Act and narrowly interpreting Act not to apply to obvious fakes, but to apply only to apparent photographs. Court held that "an image made by an exhibit which obviously consisted of parts of two different photographs taped together could not be said to 'appear to be a photograph,' although if it were itself photocopied the result could well be said to constitute a pseudo-photograph."

of the Criminal Justice Act of 1988 to include possession of "pseudo-photographs" of children. The CJPOA defines "pseudo-photograph" as:

> (7) "Pseudo-photograph" means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph
> (8) If the impression conveyed by a pseudo-photograph is that the person shown is a child the pseudo-photography shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult.

Canada

In 1993, Canada amended §163.1 of its criminal code to include computer generated pornography that "shows a person who is or is depicted" as a child.[13] That section criminalizes the production, distribution, and possession of such child pornography, defined as:

> In this section, "child pornography" means
> (a) photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

[13] See *Regina v. Sharpe*, No. 27376, 2001 S.C.C.D.J. 42, 2001 Can. Sup. Ct. LEXIS 8; 2001 SCC 2 (Can. S. Ct. Jan. 26, 2001), upholding the Act and authoritatively construing the offense and defense provisions: "The question is this: would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity?"

> that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
> the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years

Section 163.1(5) provides a defense to the production provision, which is similar to that provided in 18 U.S.C. § 2252A (c). It reads as follows:

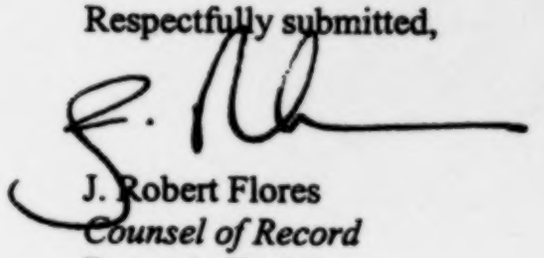
> It is not a defense to a charge under subsection (2) . . . unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

CONCLUSION

Amici respectfully submit that the CPPA is a necessary tool for the Government in its effort to protect real children from sexual abuse and exploitation. *Amici* contend that without the CPPA the entire statutory scheme will be undermined. The Nation's children deserve protection from sexual exploitation and Congress created a narrowly tailored statute to address only those materials that are virtually indistinguishable from pornographic materials already prohibited under 18 U.S.C. §§ 2251, 2252, 2256. This Honorable Court should uphold the new law as a narrowly drawn prohibition against real and realistic child pornography. There is no difference to the children and no difference to the molesters. The law need find no difference. Legitimate concerns and objections were met and accommodated by Congress in the limitations of the statutory elements and in protections of affirmative defenses.

Therefore, your *Amici Curiae* respectfully ask this Honorable Court to reverse the decision of the Court below and find the CPPA to be a Constitutional exercise of Congressional prerogative.

Respectfully submitted,



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In The

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

RECEIVED
APR 27 2001
LIBRARY SERVICES

v.

THE FREE SPEECH COALITION, ET AL.,

Respondens.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,
in support of the *Petitioners*

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25 pp

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE OF
THE NATIONAL LEGAL FOUNDATION
in support of the *Petitioners*

Pursuant to Rule 37.3(b) of the Rules of this Court, The National Legal Foundation respectfully moves the Court for leave to file a brief *amicus curiae* in *Ashcroft, et al. v. Free Speech* Coalition, et al., No. 00-795. The respondent, Free Speech Coalition, has refused to consent to the filing of the brief *amicus curiae*. The petitioner, Attorney General John Ashcroft, has consented to the filing of the brief *amicus curiae*.

The National Legal Foundation is a public interest law firm organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. In this capacity, The National Legal Foundation is gravely concerned about the threat that virtual child pornography poses to the family and to society in general. This issue is also of grave concern to the supporters of The National Legal Foundation.

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THE LIVE PERFORMANCE REQUIREMENT SHOULD NOT BE FOLLOWED BY THIS COURT BECAUSE IT IS INAPPLICABLE TO THE CPPA, PORNOGRAPHY TECHNOLOGY HAS CHANGED SINCE *FERBER*, AND THE MATERIAL PROSCRIBED BY THE CPPA IS OBSCENE. 5

A. This Court should not follow the live performance "requirement" because, unlike the instant case, *Ferber* was reviewing a statute proscribing live use. 5

B. While *Ferber* seems to require a live performance, this requirement no longer applies because the technology has changed since that decision. 6

C. Even if the pornographic images of children do not involve a live performance they are still obscene and are not protected. 7

D. In evaluating the Ninth Circuit's reading of *Ferber*, this Court should bear in mind possible internal inconsistencies in the *Ferber* opinion. 8

II. THE DIRECT HARM RATIONALE OF *FERBER* SHOULD NOT BE SEEN AS THE ONLY POSSIBLE RATIONALE UNDER WHICH THE CPPA CAN BE UPHELD 9

A. The direct harm rationale was derived from the nature of the statute before the *Ferber* Court. 10

B. *Ferber's* direct harm rationale should not be used as a shield for pornography technology that did not exist when *Ferber* was decided. 11

C. This Court should also modify or clarify *Ferber's* discussion of the use of adults who look like minors. 14

1. The context of the "use of adults" exception shows that it is not in conflict with the secondary effects rationale. 15

2. In the alternative, this Court should modify any portion of *Ferber* that sets the "use of adults" exception in conflict with the secondary effects rationale. 16

III. THIS COURT SHOULD CLARIFY ITS DISCUSSION OF PORNOGRAPHIC SIMULATIONS. 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES page

Free Speech Coalition v. Reno, 198 F.3d 1083, (9th Cir. 1999) 3, 7, 9, 11, 14, 18

New York v. Ferber, 458 U.S. 747 (1982) 1-18

Osborne v. Ohio, 495 U.S. 103, (1990) 11-13

United States v. Acheson, 195 F.3d 645 (11th Cir. 1999) 3, 12

United States v. Hilton, 167 F.3d 61 (1st Cir. 1999) 3, 12

United States v. Mento, 231 F.3d 912 (4th Cir. 2000) 3

United States v. Pearl, 89 F. Supp. 2d 1237 (N.D. Utah 2000) 3, 13

OTHER AUTHORITIES

Child Pornography Protection Act of 1996 ..... 1, 18

INTEREST OF AMICUS CURIAE

The National Legal Foundation is a public interest law firm organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. In this capacity, The National Legal Foundation is gravely concerned about the threat that virtual child pornography poses to the family and to society in general. This issue is also of grave concern to the supporters of The National Legal Foundation.

SUMMARY OF THE ARGUMENT

At issue in this case is the constitutionality of the Child Pornography Protection Act of 1996 (CPPA). Amicus believes that the CPPA is constitutional. However, the Ninth Circuit relied heavily upon this Court's opinion in *New York v. Ferber,* 458 U.S. 747 (1982) in holding the CPPA unconstitutional.

Amicus does not believe that the Ninth Circuit read *Ferber* correctly. However, Amicus recognizes that this Court could decide that the Ninth Circuit did read *Ferber* correctly, either in whole or in part. Therefore, this brief will show that even if the Ninth Circuit has understood *Ferber* correctly, this Court can still hold the CPPA constitutional.

Specifically, this brief will suggest that this Court should do the following things if it believes that the Ninth Circuit correctly interpretted *Ferber*: First, this Court should examine *Ferber's* live performance requirement

in light of the changes in technology since *Ferber* was decided. Second, this Court should clarify that despite the live performance requirement of *Ferber*, virtual child pornography is still obscene and therefore is not protected speech. Third, this Court should emphasize that the *Ferber* opinion was dealing with a different statute, one that required live use. Therefore, the *Ferber* court rationale should not serve as a limitation in this case since the statute at issue here proscribes a different type of child pornography. Fourth, *Ferber* needs to be revisited in order to clarify how its rationale should interact with the secondary effects rationale articulated by this Court in subsequent cases. Fifth, this Court should clarify *Ferber's* discussion of pornographic simulations. In addition, this Court should clarify what appears to be inconsistencies or at least internal tensions within the opinion. These inconsistencies appear to have impacted the Ninth Circuit's analysis in multiple ways.

If this Court will take these actions, the constitutionality of the CPPA will become obvious. Thus, even if this Court decides that the Ninth Circuit read all or part of *Ferber* correctly, this Court can still uphold the CPPA.

ARGUMENT

At issue in this case is the constitutionality of the Child Pornography Protection Act of 1996 (CPPA). Amicus believes that the CPPA is constitutional. This brief will examine one sub-issue under this larger issue: why this Court

should uphold the CPPA even if it decides that the Ninth Circuit Court of Appeals correctly read this Court's decision in *New York v. Ferber,* 458 U.S. 747 (1982), to require a finding of unconstitutionality. *See Free Speech Coalition v. Reno*, 198 F.3d 1083, (9th Cir. 1999).

The Ninth Circuit relied heavily upon *Ferber* and its rationale in striking down the CPPA. At the heart of the Ninth Circuit's reading of *Ferber* is its understanding that *Ferber* requires statutes that criminalize child pornography to limit the offense to works that use real, recognizable children in the production of the work. *Id.* at 1092. This brief will examine the possibility that the Ninth Circuit read this and related portions of *Ferber* correctly—in whole or in part—and suggest how and why this Court should clarify, modify, or overturn those portions of *Ferber* upon which the Ninth Circuit relied in order for this Court to uphold the constitutionality of the CPPA.

In reality, Amicus does not believe that the Ninth Circuit read *Ferber* correctly. Rather, Amicus believes that other courts, which have read *Ferber* in a less limiting light, are correct. For example, three other courts of appeals and one district court have not interpreted *Ferber* so narrowly as to prohibit only pornography produced with actual children. *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999); *United States v. Pearl*, 89 F. Supp. 2d 1237 (N.D. Utah 2000). These courts have taken

a broad approach to interpreting *Ferber* and have not seen any conflict between the *Ferber* rationale and upholding the CPPA's prohibition of virtual pornography.

However, Amicus recognizes that this Court could decide that the Ninth Circuit did read *Ferber* correctly. Therefore, this brief will address what this Court should do, in light of technological change and the opinions of this Court in other pornography cases, to clarify and modify *Ferber*.

If the Ninth Circuit correctly interpreted *Ferber*, then *this Court* will need to revisit that opinion for several reasons. First, the live performance requirement needs to be examined in light of the changes in technology since *Ferber* was decided. Second, despite the live performance requirement of *Ferber*, virtual child pornography is still obscene and therefore is not protected speech. Third, this Court should emphasize that the *Ferber* opinion was dealing with a different statute, one that required live use. Therefore, the *Ferber* court rationale should not serve as a limitation in this case since the statute at issue here proscribes a different type of child pornography. Fourth, *Ferber* needs to be revisited in order to clarify how its rationale should interact with the secondary effects rationale articulated by this Court in subsequent cases. Fifth, this Court should clarify *Ferber's* discussion of pornographic simulations. In addition, this Court should clarify what appears to be inconsistencies or at least internal tensions within the opinion. These inconsistencies appear

to have impacted the Ninth Circuit's analysis in multiple ways.

I. THE LIVE PERFORMANCE REQUIREMENT SHOULD NOT BE FOLLOWED BY THIS COURT BECAUSE IT IS INAPPLICABLE TO THE CPPA, PORNOGRAPHY TECHNOLOGY HAS CHANGED SINCE *FERBER*, AND THE MATERIAL PROSCRIBED BY THE CPPA IS OBSCENE.

A. This Court should not follow the live performance "requirement" because, unlike the instant case, *Ferber* was reviewing a statute proscribing live use.

The reason the *Ferber* Court emphasized live use of actual children is because that was what the statute before the Court was proscribing. *Ferber*, 458 U.S. 747, 750-51 (construing N.Y. Penal Law, Art. 263 (McKinney 1980)). Therefore, the Court's discussion was naturally limited to live use. As will become apparent in the discussion below, when the *Ferber* Court distinguished between live use and other technologies, it did not have in view the technologies proscribed by the CPPA. In *Ferber*, this Court distinguished between pornography derived from live performances by children, on the one hand; and simulations, editing, and use of young-looking adults on the other hand. *Id.* at 762-63. This Court was not distinguishing between pornography derived from live

performances by children and pornography based on the technologies targeted by the CPPA, namely virtual pornography and morphing of images of actual children.

Thus, this Court could emphasize that the *Ferber* limitation is only applicable to situations in which distinctions such as those actually in play in *Ferber* are involved. In other words, this Court could hold that the *Ferber* rationale, while correctly articulated by the Ninth Circuit, was inappropriately applied by that court to the CPPA.

B. While *Ferber* seems to require a live performance, this requirement no longer applies because the technology has changed since that decision.

However, this Court has another option. It could simply declare that because of changing pornography technology, the distinction upon which the *Ferber* rationale is based is no longer workable. In that case, this Court could simply uphold the CPPA under other precedents of this Court (see below) or it could adopt a more workable distinction, one that is more likely to stand up to changing technology. (However, in light of the ever changing technology, Amicus believes that finding a new workable distinction may be problematic.)

C. Even if the pornographic images of children do not involve a live performance they are still obscene and are not protected.

This Court should also emphasize that even if the Ninth Circuit read the live performance rationale correctly, it ignored a critical element of the *Ferber* Court's calculus. The Ninth Circuit wrote: "While the government is given greater leeway in regulating child pornography, materials or depictions of sexual conduct 'which do not involve live performance or photographic or other visual reproductions of live performances, retains First Amendment protection.'" *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1092 (9th Cir. 1999) (quoting *New York v. Ferber*, 458 U.S. 747, 765 (1982)). However, by looking at the whole sentence in *Ferber* upon which the Ninth Circuit relied, one discovers the missing element. The *Ferber* Court stated: "We note that the distribution of descriptions or other depictions of sexual conduct, *not otherwise obscene*, which do not involve live performance or photographic or other reproduction of live performances, retains First Amendment protection." *Ferber,* 458 U.S. at 765 (emphasis added). Thus, this Court could decide that the Ninth Circuit correctly read the live performance requirement yet once again misapplied it, since the child pornography proscribed by the CPPA is otherwise obscene. After all, the *Ferber* Court itself wrote that "[r]ecognizing and classifying child pornography as a category of material outside the protection of

the First Amendment is not incompatible with our earlier decisions." 458 U.S. at 763-64 (1982).

D. In evaluating the Ninth Circuit's reading of *Ferber*, this Court should bear in mind possible internal inconsistencies in the *Ferber* opinion.

To the extent that the Ninth Circuit correctly understood *Ferber's* live performance requirement to compel a finding of unconstitutionality, this Court should acknowledge that this portion of *Ferber* is inconsistent with other portions of *Ferber* and over turn that part of *Ferber*. In other words, many other portions of *Ferber* clearly indicate that the CPPA is constitutional. First, the *Ferber* Court declared child pornography to have only *de minimus* value of the work. *Id.* at 762. Second, this Court stated child pornography gets less protection than that provided by the *Miller* test because "a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nonetheless embody the hardest core of child pornography." *Id.* at 761 (quoting *Miller v. California,* 413 U.S. 15 (1973)). Furthermore, as previously mentioned, the *Ferber* Court also emphasized that obscene material such as child pornography has no First Amendment protection at all. *Id.* at 763-64.

All of these statements by this Court, if applied to the CPPA, would lead to a finding of constitutionality. Therefore, if this Court believes that the Ninth Circuit correctly determined that

the live performance requirement compelled a finding of unconstitutionality, this Court should explicitly overturn or modify the live performance requirement.

II. THE DIRECT HARM RATIONALE OF *FERBER* SHOULD NOT BE SEEN AS THE ONLY POSSIBLE RATIONALE UNDER WHICH THE CPPA CAN BE UPHELD.

The second major element that the Ninth Circuit relied upon in interpreting *Ferber* was a direct harm requirement. *Free Speech*, 198 F.3d at 1092. According to the Ninth Circuit, *Ferber* discusses only the direct harm caused to children used in the creation of the pornographic images. The *Ferber* court never discuses or even hints at any secondary effects that can occur to children who are not used in the creation of the images. *Id.*

Here too, the Ninth Circuit may have correctly read *Ferber*. The *Ferber* Court wrote that "[t]he legislative judgment, as well as the judgment found in relevant literature, is that the *use of children as subjects of pornographic materials* is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." 458 U.S. at 758. The Ninth Circuit pointed out that "the state's interest was in safeguarding the physical and psychological well-being of a minor." 198 F.3d at 1092.

According to the Ninth Circuit's reading of *Ferber,* the CPPA's ban on virtual child pornography must fall because of its lack of direct harm to children. However, should this Court accept the Ninth Circuit's reading of *Ferber*, it should nonetheless uphold the constitutionality of the CPPA for the following reasons.

A. The direct harm rationale was derived from the nature of the statute before the *Ferber* Court.

As mentioned previously, the *Ferber* court was dealing with a New York statute punishing the actual use of children in the creation of child pornography. *Ferber*, 458 U.S. at 750-51. New York, therefore, naturally justified the statute by the direct harms inflicted upon the children used in the production of the pornography. The Ninth Circuit correctly pointed this out. However, simply because the *Ferber* court accepted and discussed New York's justification does not mean that the CPPA cannot be upheld on any other grounds. Thus, the Ninth Circuit's mistake was not necessarily in its reading of what *Ferber* said about direct harm to children. Rather, its error was to limit itself to that rationale and to its understanding of the implications of that rationale. As will be discussed below, this Court should address both of these problems.

B. *Ferber's* direct harm rationale should not be used as a shield for pornography technology that did not exist when *Ferber* was decided.

The Ninth Circuit acknowledged that pornography technology has advanced in recent years when it noted that Congress added the "appears to be" language to the CPPA because of the new technology. The Ninth Circuit stated "[t]he Senate reasoned that advances in technology distinguished the *Ferber* Court's holding because in 1982 when *Ferber* was decided 'the technology to produce visual depictions of child sexual activity indistinguishable from unretouched photographs of actual children engaging in 'live performances' did not exist." *Free Speech Coalition*, 198 F.3d at 1095 (quoting S. Rep. No. 104-358, at 21 (1996)).

Assuming *arguendo* that the Ninth Circuit was correct in its assertion that the pornography targeted by the CPPA does not produce direct harm to children, that court was nonetheless incorrect to conclude that the CPPA could not be upheld on other grounds. Therefore, this Court should explicitly hold that the CPPA can be upheld under a secondary effects rationale.

This Court should clarify that there is no conflict between its decision in *Ferber* and its decision in *Osborne v. Ohio*, 495 U.S. 103, (1990). In *Osborne,* this Court's rationale was based upon, not only primary effects harm but also, the secondary effects that child pornography

can have when pedophiles use it to seduce children. *Id.* at 111. The *Osborne* opinion relied on the results of the Attorney General's Commission on Pornography's *Final Report*, which was issued in 1986. *Id.* This report was not available to the *Ferber* court in 1982.

It is true that *Osborne* involved a live use statute, *Id.* at 106, but the secondary effects argument logically applies to either a live use statute or a virtual pornography statute. Indeed, additional government studies have shown just that and have been relied upon by lower federal courts to uphold the CPPA.

Three courts of appeals and one district court have all relied on a secondary effects argument to support the ban on virtual pornography. In *United States v. Acheson*, the Court of Appeals for the Eleventh Circuit upheld the CPPA and stated "virtual pornography is a powerful tool in pedophiles' arsenals as 'a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity.'" 195 F.3d 645, 649 (11th Cir. 1999) (quoting CPPA, Pub.L.No 104-208, §1(3), 110 Stat. 3009-26 (1996)). In *United States v. Hilton*, the Court of Appeals for the First Circuit upheld the CPPA and discussed several secondary effects harms. One unique danger and harm mentioned in that opinion was "[i]mages made by manipulating an innocent picture of a real child to show sexual conduct can also be used to blackmail that child into

submitting to abuse and remaining in fearful silence about it." 167 F.3d 61, 67 (1st Cir. 1999). In *United States v. Pearl*, 89 F. Supp. 2d 1237, 1244 (N.D. Utah 2000), the U.S. District Court for the District of Utah upheld the CPPA's ban on virtual pornography and specifically noted the CPPA's Congressional Findings stating that the danger to children is just as great with real or virtual images. The *Pearl* court then declared "[s]urely, the easily created and massive proliferation of computer generated child pornography will result in more frequent use of those images to harm real children." *Id.* In supporting this argument, the court pointed to the testimony of several congressional witnesses who stated the danger to actual children who are seduced or molested with the aid of sexually explicit pictures is as great when virtual pictures are used as when unretouched photos are used. *Id.* at 1245.

Thus, here again the Ninth Circuit's error may not have been its reading of *Ferber*. Rather, its error was its refusal to examine the CPPA in light of both *Ferber* and *Osborne*. In particular, the Ninth Circuit refused to acknowledge the CPPA's Congressional Findings on the secondary effects dangers of virtual pornography. This was exactly the criticism leveled against the Ninth Circuit, by the *Pearl* court. According to that court "[t]hese Congressional Findings were basically brushed aside in the Ninth Circuit's Free Speech Coalition case . . ." 89 F. Supp. 2d at 1245.

Therefore, even if this Court believes that the Ninth Circuit correctly read the direct harm rationale, it should explicitly declare that that is not the only possible analysis to apply to the CPPA. This Court should uphold the CPPA under a secondary harm analysis.

C. <u>This Court should also modify or clarify *Ferber's* discussion of the use of adults who look like minors.</u>

Considering the evidence of the secondary effects, one might think that the Ninth Circuit was without excuse in excluding the secondary effects argument in its rationale. The Ninth Circuit, though, was not ignorant of the secondary effects argument. In fact, the Ninth Circuit saw the *Ferber* holding as an insurmountable roadblock to accepting any secondary effect arguments. The Ninth Circuit believed that the "vulnerability argument [*i.e.*, the secondary effects argument] makes no constitutional sense in light of *Ferber's* acknowledgment that adults who look like minors can be used in sexually explicit 'art' or film depictions." *Free Speech Coalition*, 198 F.3d at 1094.

This Court should either explain how the Ninth Circuit misunderstood the implications of the secondary effects rationale or, if this Court believes that the Ninth Circuit was correct on the implications, it should modify any portions of *Ferber* that cannot stand in the face of the Congressional Findings.

1. The context of the "use of adults" exception shows that it is not in conflict with the secondary effects rationale.

While the Ninth Circuit may have read the direct harm rationale correctly, and while it correctly pointed out *Ferber's* "use of adults" exception; it may have missed the context and thus seen an incompatibility that does not exist. *Ferber's* "use of adults" exception arose in the context of *Ferber's* discussion of the *value* of child pornography. After deciding that child pornography had only an "exceedingly modest, if not *de minimus*" value, 458 U.S. at 762, the Court continued, saying "we consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of literary performance or scientific or educational work." *Id.* at 763. It was after making this statement that the court added, "as a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who looks younger could be utilized." *Id.*

Contrary to the Ninth Circuit's assertion, there is no inherent incompatibility in allowing a "use of adults" exception for those rare cases in which literary or artistic value may actually be at issue and in upholding the CPPA under a secondary effects rationale. Indeed, logically, the "use of adults" exception would only apply to material that is not otherwise obscene and the

secondary effects rationale would only apply to material without constitutional protection.

It is instructive to remember exactly what the *Ferber* Court was talking about in its discussion of the "use of adults" exception. For support of its "use of adults" exception, the *Ferber* Court cited the Brief of the Petitioner. 458 U.S. at 763. The examples in that Brief are clearly examples of materials with some artistic merit, not examples of obscene, unprotected materials. Specifically, the Brief describes the use of an adult to play the title role in a Broadway production of *Lolita*. It also describes the use of doubles for the then-teen-aged Brooke Shields' nude scenes in the films *The Blue Lagoon* and *Endless Love*. Brief of Petitioner at 25.

2. In the alternative, this Court should modify any portion of *Ferber* that sets the "use of adults" exception in conflict with the secondary effects rationale.

In the event that this Court believes that the Ninth Circuit was actually correct—not only about *Ferber's* direct harm rationale, but also about a conflict between a secondary effects rationale and *Ferber's* "use of adults" exception—this Court should explicitly overturn or modify any portion of *Ferber* necessary to eliminate that conflict. To the extent that the "use of adults" exception prevents a finding of constitutionality, that exception is in conflict with other portions of *Ferber*.

All those portions of Ferber that are possibly in conflict with the live performance requirement (see above), are also implicated by the possible conflict with the "use of adults" exception. As summarized previously, the *Ferber* Court declared child pornography to have only *de minimus* value of the work. *Id.* at 762. The *Ferber* Court also stated that child pornography gets less protection than that provided by the *Miller* test because "a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nonetheless embody the hardest core of child pornography." *Id.* at 761 (quoting *Miller v. California,* 413 U.S. 15 (1973)). Furthermore, the *Ferber* Court also emphasized that obscene material such as child pornography has no First Amendment protection at all. *Id.* at 763-64.

All of these statements by this Court, if applied to the CPPA, would lead to a finding of constitutionality. Therefore, if this Court believes that the Ninth Circuit correctly ascertained a conflict between the "adult use" exception and a secondary effects rationale (which conflict results in a rejection of the secondary effects rationale and, therefore, a finding of unconstitutionality), this Court should explicitly overturn or modify those portions of *Ferber* that cannot stand up to the tests of changing technology and the CPPA's Congressional Findings.

III. THIS COURT SHOULD CLARIFY ITS DISCUSSION OF PORNOGRAPHIC SIMULATIONS.

In its decision striking down the CPPA, the Ninth Circuit also relied upon the *Ferber* Court's comment that "[s]imulations outside the prohibition of the statute could provide another alternative [to live performances]." *Free Speech Coalition*, 198 F.3d at 1092 citing *Ferber*, 458 U.S. at 763). Because the Ninth Circuit was correct that this language exists in *Ferber*, this Court should clarify what it meant or explicitly abandon this one sentence.

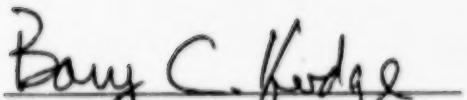
The discussion of the simulations exception occurred in the same section f the *Ferber* opinion as did the "use of adults" discussion. Thus, everything mentioned in part III. of this brief is applicable here. The use of simulations, even under *Ferber* would only apply to materials with artistic merit. Everything that was discussed above about changing technology and secondary effects is equally applicable here.

This Court should emphasize that simulations were discussed as a possible alternative to the use of adults exception. Just as this Court should emphasize that the possibility of the use of adults is not in conflict with upholding the CPPA under a secondary effects rationale, so it should emphasize that the possibility of simulations is not in conflict with upholding the CPPA under that rationale.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reversed and the CPPA should be declared constitutional.

Respectfully submitted
this 22nd day of April, 2001



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Supreme Court of the United States

JOHN D. ASHCROFT,
Attorney General of the United States, *et al.*,
Petitioners,

v.

THE FREE SPEECH COALITION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LIBERTY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* AND INTRODUCTION 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE CPPA IS AN UNCONSTITUTIONAL PROHIBITION ON PROTECTED SPEECH. 5

A. The Material Criminalized By the Act Does Not Fall Into Any Recognized Category of Unprotected Speech. 5

B. This Court Should Decline to Create a New Category of Unprotected Speech. 9

1. The CPPA Criminalizes a Wide Scope of Constitutionally Protected Speech. 10

2. The Government's Asserted Interests Do Not Justify Creating a New Category of Unprotected Speech. 14

a. Concerns with the Effect on Listeners Is a Flatly Invalid Reason to Suppress Speech. 14

b. The Government's Interest in Preventing the Seduction of Children Is Insufficient. 16

c. The "Dry Up the Market" Theory Does Not Justify the Ban on Protected Speech. 18

TABLE OF CONTENTS - continued

Page

d. The Interest in Facilitating the Enforcement of Valid Child Pornography Laws Does Not Justify the CPPA's Invalid Reach. 20

II. THE CPPA CANNOT SURVIVE STRICT SCRUTINY 22

A. The Government's Asserted Justifications Are Insufficient. 23

B. The Act's Affirmative Defense Does Not Cure Its Constitutional Flaws. 23

III. THE CPPA IS UNCONSTITUTIONALLY OVERBROAD. 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES Page

American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001) 18

American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) 15

Bartnicki v. Vopper, 121 S. Ct. 1753 (2001) 19

Beauharnais v. Illinois, 343 U.S. 250 (1952) 6

Brandenburg v. Ohio, 395 U.S. 444 (1969) 6, 16

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 25, 26

Camfield v. City of Oklahoma City, 248 F.3d 1214 (10th Cir. 2001) 12

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 6

Ginsberg v. New York, 390 U.S. 629 (1968) 16

Kingsley International Pictures Corp. v. Regents of the University of New York, 360 U.S. 684 (1959) 17

Kyllo v. United States, 121 S. Ct. 2038 (2001) 21

Miller v. California, 413 U.S. 15 (1973) 6

Mullaney v. Wilbur, 421 U.S. 684 (1975) 25

New York v. Ferber, 458 U.S. 747 (1982) ..... *passim*

Oklahoma v. Blockbuster Videos, Inc., No. Civ-97-1281-T, 1998 WL 1108158 (W.D. Okla. Oct. 20, 1998) 12, 13, 14

TABLE OF AUTHORITIES - continued

Page

Osborne v. Ohio, 495 U.S. 103 (1990) ..... *passim*

Patterson v. New York, 432 U.S. 197 (1977) 25

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) ... 5, 9, 22

Reno v. ACLU, 521 U.S. 844 (1997) 22

Sandstrom v. Montana, 442 U.S. 510 (1979) 24, 25

Stanley v. Georgia, 394 U.S. 557 (1969) 14, 22

Texas v. Johnson, 491 U.S. 397 (1989) 5

United States v. Acheson, 195 F.3d 645 (11th Cir. 1999) 17, 22

United States v. Fox, 248 F.3d 394 (5th Cir. 2001) 12, 17, 22, 24

United States v. Hilton, 167 F.3d 61 (1st Cir. 1999), *cert. denied*, 528 U.S. 844 (1999) 17, 22

United States v. Knox, 32 F.3d 733 (3d Cir. 1994) 10

United States v. Mento, 231 F.3d 912 (4th Cir. 2000), *petition for cert. filed*, (U.S. Jan. 22, 2001) (No. 00-8114) 17, 22

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 5, 15, 22, 23

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 8, 9, 25

In re Winship, 397 U.S. 358 (1970) 25

TABLE OF AUTHORITIES - continued

Page

STATUTES

18 U.S.C. § 2243 17

18 U.S.C. § 2251 note (Supp. V 1999) ..... *passim*

18 U.S.C. § 2252A(c) 23, 24

18 U.S.C. § 2256 ..... *passim*

N.Y. Penal Law § 130.65(3) 17

Okla. St. tit. 21 § 1021.2 (Supp. 1997) 12

LEGISLATIVE MATERIAL

S. Rep. No. 104-358 (1996) 14, 21

MISCELLANEOUS

Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209 (2001) 19, 20

Celestine Bohlen, *A New "Lolita" Stalls in Europe; Hollywood Snubs Remake of the Tale of an Adolescent Siren*, N.Y. Times, Sept. 23, 1997 11

Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 Harv. J. on Legis. 439 (1997) 14

Clay Calvert, *The "Enticing Images" Doctrine: An Emerging Principle in First Amendment Jurisprudence?* 10 Fordham Intel. Prop. Med. & Ent. L.J. 595 (2000) 18

TABLE OF AUTHORITIES - continued

Page

Richard Covington, *'Lolita' Makes the European Rounds Remake based on Nabokov novel opens in France but still has no U.S. distributor*, L.A. Times, Jan. 20, 1998 ..... 11, 12

Debra Galant, *Peeking Under the Bearskin Rug*, N.Y. Times, Feb. 27, 2000 11

Dennis Howitt, *Pornography and the pedophile: Is it criminogenic?*, 68 Brit. J. of Med. Psych. 15 (1995) 20

Bill Lohmann, *Now, What's Wrong With This Picture?* Richmond Times-Dispatch, Apr. 11, 2000 10

Steve Marshall & Hilary Wasson, *Pictures of Daughter In Bath Submerge Mom in Hot Water*, U.S.A. Today, Feb. 28, 2000 10

INTEREST OF *AMICUS CURIAE*[1] AND INTRODUCTION

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech, because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. This case presents the possibility that the federal government will restrict these liberties. Because of The Liberty Project's strong interest in protecting citizens from any government overreaching and in defending the constitutional rights of citizens from efforts to deny them, it is well situated to provide this Court with additional insight into the issues presented in this case.

Amicus does not oppose the application of valid child pornography laws criminalizing the creation and distribution of materials depicting actual children engaging in sexually explicit conduct. *Amicus* has grave concerns, however, about the law at issue in this case, the Child Pornography Prevention Act. In the Act, Congress has untethered child pornography law from its constitutional moorings, taking the unprecedented step of banning sexually explicit, though not necessarily obscene, material that merely "appears to be" or "conveys the impression" of depicting a minor. The CPPA thus violates sound constitutional principles, reflected in this Court's

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[1] The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

precedents, that permit the wholesale prohibition of non-obscene images *only* to protect the actual children depicted. The Act, and the rationales offered to justify its broad scope, threaten the suppression of a substantial amount of otherwise-protected speech.

Given these concerns, and for the reasons set forth below, *amicus* urges the Court to affirm the decision of the court of appeals.

STATEMENT OF THE CASE

Congress enacted the Child Pornography Prevention Act ("CPPA" or the "Act") on September 30, 1996. The Act expanded the federal definition of "child pornography," criminalizing, for the first time ever, expressive material that "appears to be" or "conveys the impression" of minors engaged in sexually explicit conduct. The broader definition targets so-called "virtual child pornography," which, unlike traditional child pornography, includes sexually explicit images that were not created with, and do not depict, actual minors.

Specifically, the CPPA defines "child pornography" as:

> any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct[2]

[2] The Act defines "sexually explicit conduct" as "actual or simulated – (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2).

> where –
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2256(8) (emphasis added).

Several plaintiffs filed suit in the Northern District of California, asserting a facial constitutional challenge to the CPPA's "appears to be" and "conveys the impression" provisions. The district court granted the government's motion for summary judgment, determining that the Act was consistent with the First Amendment. *Free Speech Coalition v. Reno*, No. C 97-0281 VSC, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997). The Ninth Circuit Court of Appeals reversed the decision of the district court, ruling that the Act unconstitutionally "makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct." *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1086 (9th Cir. 1999). Specifically, the court found that the phrases "appears to be" a minor and "conveys the impression" that the depiction portrays a minor, "are vague and overbroad, and thus do not meet the requirements of the First Amendment." This Court granted the government's Petition for a Writ of Certiorari on January 22, 2001.

SUMMARY OF ARGUMENT

In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that sexually explicit depictions of actual children are unprotected speech under the First Amendment, even if the depictions fall short of obscenity. With the passage of the CPPA, federal law now purports to criminalize the possession, display, distribution, and receipt of visual depictions, not only of actual children, but of material that "appears to be" or "conveys the impression" of a minor engaging in sexually explicit conduct. This unprecedented expansion of the definition of proscribable child pornography runs counter to core First Amendment principles and this Court's delineation of the proper boundary of constitutionally protected speech.

Because it criminalizes non-obscene expression that does not involve real children, the CPPA effectuates an unconstitutional prohibition on protected speech. In order to uphold the Act, this Court would have to effectively create a new category of wholly unprotected speech, or conclude that the content-based ban at issue here survives strict scrutiny. The interests asserted by the government – including protecting the sensibilities of viewers, preventing the seduction of children, drying up the pornography market, and facilitating enforcement of the statute – are insufficient to justify a categorical exclusion of non-obscene sexual depictions involving young-looking adults, particularly given that the statute contains no exception for material that possesses literary, artistic, political, or social value. For similar reasons, the government's asserted justifications do not survive the strict scrutiny applicable to content-based speech restrictions. Nor does the Act's affirmative defense correct the CPPA's fundamental flaws, both because of the limited scope of the defense, and because it improperly shifts the burden of proof to the defendant to

demonstrate innocence. Finally, the Act is facially overbroad because it encroaches too deeply into areas of protected speech.

ARGUMENT

I. THE CPPA IS AN UNCONSTITUTIONAL PROHIBITION ON PROTECTED SPEECH.

A. The Material Criminalized By the Act Does Not Fall Into Any Recognized Category of Unprotected Speech.

This Court has permitted the complete prohibition of expression only "in a few limited areas." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). As the Court recently cautioned, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817-18 (2000) (internal quotation marks and citation omitted).

Because of this nation's core belief that society flourishes only when its citizens are free in their ability to think and express their thoughts – even when those thoughts and beliefs are unpopular and offensive – this Court has carefully limited the rationale justifying blanket bans on speech. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). The narrow categories that have been deemed unprotected are those in which the speech causes palpable, immediate injury by its very expression, *e.g.*, defamation, *see*

Beauharnais v. Illinois, 343 U.S. 250, 267 (1952), fighting words, *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), incitement to imminent lawless action, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), child pornography depicting actual minors, *see New York v. Ferber*, 458 U.S. 747, 764 (1982), and sexually explicit speech that lacks serious value, *see Miller v. California*, 413 U.S. 15, 24-25 (1973).

Prior to *New York v. Ferber*, 458 U.S. 747 (1982), the Court sanctioned the wholesale suppression of sexually explicit speech only where such expression satisfied the three-part test for obscenity set forth in *Miller v. California*, 413 U.S. 15 (1973). The *Miller* test features several substantive protections adopted to ensure that the government criminalizes no more speech than constitutionally permitted, including a reliance on contemporary community standards, a requirement that proscribable depictions be defined, and an exception for works with serious literary, artistic, political, or social value. *Id.* at 24.

In *Ferber*, however, the Court carved out an additional category of unprotected expression – sexually explicit material that, although it may not satisfy *Miller*'s strictures, may be banned because it features young children. This Court's adoption of child pornography as a separate category of unprotected of speech is firmly, and appropriately, rooted in the recognition that the sexual abuse of actual children depicted represents such palpable, immediate harm to those children that the expression simply cannot be permitted: "When a definable class of material . . . bears so heavily and pervasively on the welfare of *children engaged in its production*," the Court explained, "it is permissible to consider these materials as without the protection of the First Amendment." *Ferber*, 458

U.S. at 764 (emphasis added).[3]

The Court in *Ferber* thus expressly justified the unprotected status of child pornography by reference to the identifiable harm suffered by the actual child performers. *Id.* at 758-59. And, because of the inherent abuse suffered by the depicted minors, the Court approved the removal of *Miller*'s requirement that the speech lack serious literary, artistic, scientific, and political value. According to the Court, this exception to *Miller*, and the associated encroachment on otherwise protected expression, survived constitutional scrutiny *only* because of the concrete harm inflicted on the actual minors featured:

> Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be 'patently offensive' in order to have required the sexual exploitation of a child for its production. . . It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.

Ferber, 458 U.S. at 761 (internal quotation marks and citation omitted). *See also id.* at 774-75 (O'Connor, J., concurring) ("[A] 12-year-old child photographed while masturbating

---

[3] Of course, some materials may qualify both as obscenity and child pornography. To the extent that materials covered by the CPPA (featuring, for example, youthful-looking adults instead of minors) also constitute obscenity, *amicus* recognizes that these materials may be lawfully banned as obscenity (notwithstanding the constitutional infirmity of the CPPA).

surely suffers the same psychological harm whether the community labels the photograph 'edifying' or 'tasteless.' The audience's appreciation of the depiction is simply irrelevant to [the government's] asserted interest in protecting children from psychological, emotional, and mental harm.").

Because of the dangers of any categorical First Amendment exclusion, the Court in *Ferber* defined child pornography extremely narrowly, ensuring that only depictions of real minors in sexually explicit poses would be unprotected. In drawing this bright line, the Court made clear that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." *Id.* at 764-65. The Court reinforced this rule, clarifying that it is the abusive conduct suffered by the child depicted – and not the mere appearance of distasteful images – that supports the categorical exception to *Miller*: "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *Id.* at 763 (footnote omitted).

Subsequent decisions of the Court have never wavered from *Ferber*'s narrow definition of child pornography. The definition was left untouched by *Osborne v. Ohio*, 495 U.S. 103 (1990), which addressed only whether states could ban the possession (in addition to the creation or distribution, as in *Ferber*) of real child pornography.[4] Four years later, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Court

[4] The state statute in *Osborne* covered only depictions of actual children. *Osborne*, 495 U.S. at 106.

confirmed *Ferber's* limits on child pornography, stating that "nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment." *Id.* at 72.[5]

B. This Court Should Decline to Create a New Category of Unprotected Speech.

Because the CPPA bans expression that falls outside the Court's narrow definition of child pornography, it can be upheld against constitutional challenge only if this Court creates what effectively is a new and dangerously broad category of unprotected speech, or if this Court concludes that the statute survives strict scrutiny. The government in this case asks the Court to reverse its trend over the last forty years of "narrow[ing] the scope of the traditional categorical exceptions," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992), and instead urges it to conclude that the speech at issue falls wholly outside the scope of the First Amendment. In doing so, the government relies on a series of rationales that have never before been deemed sufficient to sustain a categorical ban on speech. As set out below, *amicus* urges this Court to decline the government's invitation. Although *amicus* heartily endorses the conclusion that real child pornography is repugnant and properly criminalized, the statute at issue here

[5] *X-Citement Video* addressed the scienter requirement in the federal child pornography statute, holding that defendants could be convicted only upon proof that the they knew of the minority of the children depicted. *Id.* at 78. The Court highlighted the First Amendment underpinnings of its decision, explaining that "a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts." *Id.* (citing *Ferber*, 458 U.S. at 765, and *Osborne*, 495 U.S. at 115). *X-Citement Video* thus reinforced the principle, articulated in *Ferber*, that nonobscene sexual expression can be banned only if it involves the abuse of actual minors.

does not criminalize that behavior, but instead sweeps in a wide variety of speech that, *inter alia*, has serious literary or artistic value, and the production of which does not involve – and therefore does not harm – any real minor.

1. The CPPA Criminalizes a Wide Scope of Constitutionally Protected Speech.

Through the CPPA, Congress dramatically expanded the federal definition of child pornography to cover images that do not involve actual children. By criminalizing material that merely "appears to be" or "conveys the impression" of being minors engaged in sexually explicit conduct, 18 U.S.C. § 2256(8)(B) & (D), Congress expressly targeted images that are not obscene and do not involve the use of actual children.

The scope of the Act's prohibition is stunning. Even prior to the 1996 amendments to the federal statute, child pornography laws nationwide covered a vast array of material. The federal law's prohibition of "lascivious exhibition of the genitals," for example, has been interpreted to include pictures of minors that contain absolutely no nudity. *See United States v. Knox*, 32 F.3d 733, 751 (3d Cir. 1994). Similarly, aggressive prosecution of state child pornography laws recently has targeted, for instance, a mother's photographs of her eight-year-old daughter bathing in a bathtub,[6] and a grandmother taking pictures of her undressed four- and six-year-old

[6] *See, e.g.*, Steve Marshall & Hilary Wasson, *Pictures of Daughter In Bath Submerge Mom in Hot Water*, U.S.A. Today, Feb. 28, 2000, at 5A. The arrested woman in that case ultimately agreed to enter into a counseling program and have her photographs destroyed, rather than go to trial and risk sixteen years of prison if convicted. *See, e.g.*, Bill Lohmann, *Now, What's Wrong With This Picture?* Richmond Times-Dispatch, Apr. 11, 2000, at D1.

granddaughters.[7]

Melding the Act's remarkably broad definition of "lascivious exhibition" with depictions of adults who "appear[] to be" younger than 18 could allow the prosecution of the producers, distributors or viewers of a vast amount of mainstream expression that merely suggests sexual conduct without actually depicting any nude or explicit images of real minors. And the fact that the Act contains no exception for artistic works could easily lead to the criminalization of art that suggests sexual conduct in which a minor is involved, even where no minor actually participated in any way in the production of the material in question.

These concerns are not merely abstract. During the initial release of the recent film version of Nabokov's classic novel *Lolita*, for example, American distributors refused to carry the film for fear of violating the recently enacted CPPA.[8] The Act thus has already had a real, demonstrable chilling effect on artistic work, notwithstanding the film maker's marked efforts to excise any potentially problematic scenes.[9] Thus, even short

[7] *See, e.g.*, Debra Galant, *Peeking Under the Bearskin Rug*, N.Y. Times, Feb. 27, 2000, at 14NJ1.

[8] *See, e.g.*, Celestine Bohlen, *A New "Lolita" Stalls in Europe; Hollywood Snubs Remake of the Tale of an Adolescent Siren*, N.Y. Times, Sept. 23, 1997, at E1.

[9] *See, e.g.*, Bohlen, *supra*, at E1. ("[T]here are very few sex scenes in 'Lolita,' even fewer after [the director] and a lawyer specializing in First Amendment cases spent five to six weeks making cuts to bring the film into conformity with the Child Pornography Prevention Act of 1996."); Richard Covington, *"Lolita" Makes the European Rounds Remake based on Nabokov novel opens in France but still has no U.S. distributor*, L.A. Times, Jan. 20, 1998, at F1 ("Although the director used body doubles for

of prosecution and conviction, informal censorship of the sort experienced by *Lolita* can have a devastating effect on the free flow of protected expression.[10]

Similarly, events surrounding the confiscation of the Academy Award-winning film *The Tin Drum* starkly illustrate the dangers of statutes as broadly worded as the CPPA.[11] In 1997, a local judge issued an *ex parte* ruling declaring the film to be in violation of Oklahoma's child pornography statute. *See Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1217 (10th Cir. 2001). Pursuant to that order, Oklahoma City officials confiscated every available videotape copy of the film, in some cases visiting private homes based on information provided by video stores. *Id.* at 1219.

The Oklahoma statute under which the film was initially deemed child pornography prohibited, in language similar to the CPPA, "material wherein the minor is engaged in *or portrayed, depicted, or represented as engaging in* sexual intercourse . . . or other sexual activity." Okla. St. tit. 21 § 1021.2 (Supp. 1997) (emphasis added). In reviewing the

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sex sequences, virtually all the explicit scenes were cut to conform with the United States' Child Pornography Act of 1996.").

[10] For this reason, the supposed protections offered by the courts of appeals' various limiting constructions of the Act ring hollow. *See, e.g., United States v. Fox*, 248 F.3d 394, 405 (5th Cir. 2001) (assuming that the "troubling possibility of the statute's application to artistic expression" such as "stills from a film version of Nabokov's *Lolita*" would disappear simply by virtue of the court's narrow reading of the CPPA).

[11] The German language film also won the Palme D'or Award at the Cannes International Film Festival in 1979. *See Oklahoma v. Blockbuster Videos, Inc.*, No. Civ-97-1281-T, 1998 WL 1108158, at *2 (W.D. Okla. Oct. 20, 1998).

child pornography question, a federal district judge described the films:

> It is not disputed that [the allegedly objectionable] scenes do not contain graphic sexual activity and that the actors did not engage in actual sexual activity or contact with the genitals or genital area during any of these scenes; it is also not disputed that neither total nor frontal nudity nor the display of the genital area appears in any of these scenes.

See Oklahoma v. Blockbuster Videos, Inc., No. Civ-97-1281-T, 1998 WL 1108158, at *3 (W.D. Okla. Oct. 20, 1998). Nonetheless, the judge determined that the basic provisions of the statute applied, explaining,

> The absence of such graphic or explicit activity does not, however, necessarily mean the statute does not apply because it also prohibits material in which minors are "portrayed, depicted, or represented as engaging in" sexual conduct. Notwithstanding the absence of graphic sexual portrayals and the use of artistic film techniques, it cannot be disputed that each of the scenes can be interpreted by a viewer as suggesting some type of sexual conduct.

Id. Thus, pursuant to language akin to that of the CPPA, a federal judge labeled as prohibited child pornography an award-winning film lacking any graphic sexual activity or nudity. The film was ultimately protected from prosecution, but *only* because the Oklahoma statute – unlike the CPPA – contained an exception for "bona fide objects of art or artistic pursuits." *See id.* at *6.

2. The Government's Asserted Interests Do Not Justify Creating a New Category of Unprotected Speech.

a. Concerns with the Effect on Listeners Is a Flatly Invalid Reason to Suppress Speech.

By extending the definition of child pornography to images that do not feature real children, the CPPA targets not the harm inherent in the creation of this material, as required by *Ferber* and the other categorical exclusion cases, but rather the presumed ill-effects on listeners – in this case, pedophiles and, by extension, the children they may harm. The legislative history is clear that this was a motivating factor underlying this legislation. Indeed, Congress expressly found that the ban was justified because "a major part of the threat to children posed by child pornography is its effects on the viewers of such material." *See* S. Rep. No. 104-358, at 17 (1996). This is a plainly invalid justification for the suppression of speech. As the court of appeals recognized, "[b]ecause the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, . . . censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment." *Free Speech Coalition*, 198 F.3d at 1094. *See also, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 Harv. J. on Legis. 439, 460 (1997) ("Virtual child pornography, which is not obscene, is nothing more than an imaginative idea. However repulsive, however disgusting to majoritarian beliefs, ideas constitute protected speech."). As the court of appeals explained,

> [A]ny victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions. This is so because to hold otherwise enables the criminalization of foul figments of creative technology that do not involve any human victim in their creation or in their presentation.

Free Speech Coalition, 198 F.3d at 1093. *See also, e.g.*, *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985) (striking down ordinance prohibiting "degrading" adult pornography, and holding that, to the extent pornography perpetuates sexual oppression, this "simply demonstrates the power of pornography as speech"), *aff'd*, 475 U.S. 1001 (1986).

The government concedes, as it must, that "the regulation of speech because of its potential to incite unlawful conduct ordinarily does raise serious First Amendment concerns." Pet. Br. at 37 (citing *Brandenburg v. Ohio*, 395 U.S. at 447). Accordingly, as even the government recognizes, Congress's asserted interest in banning material simply because it "can desensitize the viewer to the pathology of sexual abuse," 18 U.S.C. § 2251 note (Supp. V 1999) (Finding 4), presents a quintessentially impermissible justification for speech regulation. *See, e.g.*, *Playboy*, 529 U.S. at 13 ("Where the designed benefit of a content-based restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails.").

b. The Government's Interest in Preventing the Seduction of Children Is Insufficient.

Congress's assessment that "child pornography is often used as part of a method of seducing other children into sexual activity," 18 U.S.C. § 2251 note (Supp. V 1999) (Finding 3), is also insufficient to justify placing the speech criminalized by the CPPA wholly outside the purview of the First Amendment. The fact that otherwise protected speech could encourage or promote unlawful activity has never been deemed sufficient to ban the speech. *See, e.g.*, *Brandenburg*, 395 U.S. at 447 (even speech that *expressly advocates* lawless activity cannot be the basis for criminal liability, unless the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

This case highlights the wisdom of that rule. "Many innocent things can entice children into immoral or offensive behavior." *Free Speech Coalition*, 198 F.3d at 1094 n.7. One can easily imagine children being lured by the offer of a comic book, a video game, or a cartoon. Under the government's rationale, a finding that such material was being used to entice children would be sufficient to justify a blanket ban on the material – a result plainly antithetical to both the First Amendment and common sense.

This does not mean, of course, that the government is powerless to do anything about the use of sexually explicit material to lure children. The state has at its disposal a variety of laws to combat the evils of child seduction, including prohibitions on showing minors certain sexually explicit material. *See Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding "harmful to minors" statute). And, of course, the state can vigorously enforce restrictions on adults actually

engaging in sexual activities with minors. *See, e.g.*, N.Y. Penal Law § 130.65(3) (McKinney 2001) (prohibiting sexual abuse of minors); 18 U.S.C. § 2243 (same). *Amicus* does not contend that these laws alone will wholly eradicate the targeted behavior. That, however, is inevitable – no set of criminal laws completely deters unlawful activity. But it has always been clear that, to the extent vigorous enforcement of valid criminal laws fails to eradicate completely their targeted crimes, the government cannot simply disregard the First Amendment in an effort to correct the problem. *See Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684, 689 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech.") (internal quotation marks and citation omitted).

The government offers a narrowing construction of the statute to address this problem, proposing to limit the CPPA's coverage of virtual child pornography to images that are "virtually indistinguishable" from photographs of real children. Pet. Br. at 24-27 (quoting 18 U.S.C. § 2251 note (Supp. V 1999) (Finding 8)). *See also United States v. Fox*, 248 F.3d 394, 405 (5th Cir. 2001); *United States v. Mento*, 231 F.3d 912, 921-22 (4th Cir. 2000); *United States v. Hilton*, 167 F.3d 61, 72 (1st Cir. 1999); *United States v. Acheson*, 195 F.3d 645, 651 (11th Cir. 1999).[12] As an initial matter, this limiting principle

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[12] The government also looks to *Osborne* to support its claimed interest in using the CPPA to prevent the seduction of children. *See* Pet. Br. at 37 (quoting *Osborne*, 495 U.S. at 111). But *Osborne*, as *Ferber* before it, addressed permissible limitations only on the use of actual children as subjects of pornographic materials. *Osborne*, 495 U.S. at 106-07. *Osborne* thus discussed the state's interests in the context of materials that inherently harm children by their very creation.

is nowhere found in the CPPA itself, and there is no assurance that the Act's application will be so limited. But the more fundamental point is that the government's reliance on the seduction rationale extends well beyond the terms of this statute. If accepted, it could lead to a host of speech regulations premised only on the purported link between the regulated material and unlawful conduct involving children. *See, e.g.*, *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001) (enjoining ordinance seeking to limit minors' access to violent video games); Clay Calvert, *The "Enticing Images" Doctrine: An Emerging Principle in First Amendment Jurisprudence?*, 10 Fordham Intel. Prop. Med. & Ent. L.J. 595, 608-11 (2000) (discussing efforts to restrict cartoons advertising cigarettes and violent images on television, movies, and in video games). The Court cannot open the door to such dramatic incursions on protected expression.

c. The "Dry Up the Market" Theory Does Not Justify the Ban on Protected Speech.

Several purported justifications for the CPPA, the government argues, are valid because they do not depend on viewers' reactions to the proscribed materials. These asserted rationales, however, are wholly unavailing. First, relying heavily on Congress's determination that "the production and

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In *Osborne*, this Court marginally extended the bounds of permissible prohibitions on *actual* child pornography, from bans on production and distribution, *see Ferber*, 458 U.S. at 751, to bans on possession. *Osborne*, 495 U.S. at 108. *Osborne*'s reliance on the seduction rationale to help justify the ban on possession is therefore unremarkable. By contrast, the CPPA's leap from prohibiting *actual* child pornography to criminalizing *imaginary* child pornography is one of an entirely different character, and cannot be supported by a rationale that relies solely on regulating the seductive effects of otherwise protected expression.

distribution of computer-generated child pornography helps to sustain the market for the production of visual depictions that involve real children," Pet. Br. at 6, the government seeks to justify the Act's new categorization of unprotected speech by arguing that it is necessary to dry up the child pornography market. *See id.* at 6, 28, 35,45-46. But although the Court has recognized that this rationale has some applicability in the child pornography context, it has only been applied to cover material that is, in itself, child pornography as defined in *Ferber*. *See Ferber*, 458 U.S. at 760-61 (justifying prohibition on advertising and selling of child pornography featuring real minors); *Osborne*, 495 U.S. at 109-10 ("Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain.").[13]

Confining the "dry up the market" theory to material *already unprotected* by the First Amendment is critical to ensuring that this rationale not swallow broader constitutional guarantees. Were the rationale applicable to any protected speech that could reasonably be viewed as stimulating pedophiles' desires and fueling the child pornography trade, its reach would be virtually boundless.

For example, "[p]edophiles often find stimulation from the very same pictures that non-pedophiles consider innocuous,

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[13] In explaining the "dry up the market" theory in the context of child pornography, the Court recently highlighted the fact that "the speech at issue is considered of minimal value." *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1762 n.13 (2001) (citing *Osborne*, 495 U.S. at 108; *Ferber*, 458 U.S. at 762). This suggests that the "dry up the market" rationale – as with the other justifications introduced in *Osborne* – applies only to valueless speech, which, absent the three-pronged protections of *Miller*, must be limited to depictions of real children.

that we extol and value." Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 259 (2001) (footnote omitted); Dennis Howitt, *Pornography and the pedophile: Is it criminogenic?*, 68 Brit. J. of Med. Psych. 15, 23 (1995) (reporting research indicating that, for pedophiles, "arousing images were often found in licit newspapers and magazines, television programmes, and videos, not usually involving nudity"). "In fact, certain pedophiles may prefer 'innocent' pictures." Adler, 101 Colum. L. Rev. at 259.[14] Thus, if Congress may ban computer-generated images simply because those images help sustain the child pornography market, so, too, can the government criminalize department store catalogues, medical textbooks, and the Disney channel. *See id.* at 259-60 & n.281 (citing materials preferred by pedophiles). The First Amendment surely forbids this result.

d. The Interest in Facilitating the Enforcement of Valid Child Pornography Laws Does Not Justify the CPPA's Invalid Reach.

The government also suggests that excluding the material at issue here from the First Amendment's reach is justified because it aids in the enforcement of prohibitions on unprotected speech. According to this theory, because computers can be used to "alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to . . . determine if the offending material was produced using children," 18 U.S.C.

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[14] "According to some theorists, the stimulation of a picture may be inversely proportional to its overtly sexualized nature: It may be the very innocence – the sexual naïveté – of the child subject that is sexually stimulating." Adler, 101 Colum. L. Rev. at 259-60 & n.282 (citing James R. Kincaid, *Erotic Innocence: The Culture of Child Molesting* 54-55 (1998)).

§ 2251 note (Supp. V 1999) (Finding 6(A)), law enforcement must be free to target computer-generated images as well as real depictions of children. *See* Pet. Br. at 27 ("Congress was concerned that the government would be unable to meet its burden of proving that a pornographic image is of a real child."). As an initial matter, however, there is no concrete evidence that current technology is thwarting the government's prosecutions of child pornography. Congress's findings on this issue speak only to the *potential* for difficult enforcement. *See* S. Rep. No. 104-358, at 17 (referring to *United States v. Kimbrough*, 69 F.3d 723, 733 (5th Cir. 1995), in which the accused raised the defense, ultimately rejected, that because of computer technology it was difficult to determine whether actual children were depicted). In fact, the government has not cited *any* case in which a defendant *successfully* avoided child pornography prosecution by relying on the purported "built-in reasonable doubt argument." *See* Pet. Br. at 27-28 (quoting S. Rep. No. 104-358, at 16).

In any event, aiding law enforcement is not a valid justification for deeming an entire category of speech outside the bounds of the First Amendment. One can easily imagine a wide range of activity – including warrantless wiretapping, physical coercion of criminal suspects, and unlimited warrantless review of the mail – that would aid the government in detecting and prosecuting criminal activity. But the mere facilitation of law enforcement plainly does not justify abandonment of the constitutional safeguards that prohibit such activity. *Cf. Kyllo v. United States*, 121 S. Ct. 2038, 2046 (2001) (holding that use of thermal imager triggers Fourth Amendment scrutiny, despite obvious law enforcement benefits). Congress cannot escape its First Amendment obligations and criminalize protected speech simply by asserting a law enforcement need for additional statutory

coverage. *See, e.g.*, *Stanley*, 394 U.S. at 568 (speech restrictions cannot "be justified by the need to ease the administration of otherwise valid criminal laws") (citing *Smith v. California*, 361 U.S. 147 (1959)).

II. THE CPPA CANNOT SURVIVE STRICT SCRUTINY

As discussed above, sexually explicit, non-obscene expression that does not contain images of actual children falls outside, and should remain outside, the narrow categories of unprotected speech currently recognized by the Court.[15] Accordingly, because it is undoubtedly a content-based prohibition on expression,[16] the CPPA is presumptively unconstitutional and "can stand only if it satisfies strict scrutiny." *Playboy*, 529 U.S. at 813; *see also Reno v. ACLU*, 521 U.S. 844, 868 (1997); *R.A.V.*, 505 U.S. at 382. The Act's

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[15] It is well-settled that sexually explicit speech that does not fall within the narrow categories of unprotected expression is entitled to First Amendment protection. *See, e.g.*, *Playboy*, 529 U.S. at 826 ("We cannot be influenced . . . by the perception that the regulation in question [of 'sexually oriented programming'] is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."); *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'") (citation omitted).

[16] The government wisely has abandoned its claim, rejected by every court of appeals to consider this issue, that the Act is content-neutral. *See United States v. Fox*, 248 F.3d 394, 400 (5th Cir. 2001); *United States v. Mento*, 231 F.3d 912, 918 (4th Cir. 2000); *United States v. Hilton*, 167 F.3d 61, 69 (1st Cir. 1999); *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1091 (9th Cir. 1999); *United States v. Acheson*, 195 F.3d 645, 650 (11th Cir. 1999).

provisions criminalizing material that "appears to be" and "conveys the impression" of being actual minors, and the government's various justifications in support of those provisions, cannot survive such scrutiny.

A. The Government's Asserted Justifications Are Insufficient.

As described above, *supra* Part I(B)(2), the government asserts four justifications in support of the Act. Two are aimed at the viewers' reactions to the images at issue, and are therefore plainly invalid. The remaining two justifications are similarly insufficient, for the reasons discussed above. For the same reasons the four asserted rationales do not provide a basis for creating a new category of unprotected speech, they also fall well short of the government's heavy burden required to sustain the CPPA's content-based, wholesale prohibition on otherwise protected speech. Just as they do not support the creation of a new category of unprotected speech, the government's justifications for the Act are not narrowly tailored to serve any compelling interest.

B. The Act's Affirmative Defense Does Not Cure Its Constitutional Flaws.

The CPPA's fundamental flaws are not cured by the Act's affirmative defense, *see* Pet. Br. at 8, 31, 33-34 (relying on affirmative defense in attempt to demonstrate constitutionality of statute), which requires the defendant to prove that actual adults were used in the depiction at issue. *See* 18 U.S.C. § 2252A(c). First, although the defense is available for most violations of the statute, it cannot be invoked by those accused of *possessing* child pornography. *Id.* Accordingly, even if an alleged possessor of child pornography *knows* that the image

does not depict an actual minor, that person cannot raise the Act's affirmative defense and still may face liability if she has knowledge that the picture "appears to be" or "conveys the impression" that it features a minor.

In addition, as with the Act's substantive definition of child pornography, the defense contains the problematic and open-ended "conveys the impression" phrase, requiring the defendant to prove that she did not "advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." *Id.* The defense is further limited by the fact that it does not protect fictional, computer-generated depictions that feature neither actual adults nor actual children.[17]

More importantly, although the CPPA's affirmative defense attempts to constrain the Act's expansive reach, the affirmative defense unconstitutionally places the burden on the defendant, not the government, to prove that the material in question does not depict an actual minor and was not promoted in such a way to convey the impression that it features actual children. This Court has made clear that the government may not recast a basic element of a crime as an affirmative defense or other presumption in order to relieve the state of its obligation to prove that critical fact beyond a reasonable doubt. *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (holding that jury instruction regarding intent improperly

[17] Even in upholding the Act, the Fifth Circuit explained the virtual uselessness of the affirmative defense. *Fox*, 248 F.3d at 405 n.45 ("In candor, we must nevertheless recognize that, as this is an affirmative defense which places the burden of proving the models' majority on defendants who are virtually certain not to be able to track down producers and actors to adduce evidence of age, the defense is likely illusory.").

created presumption that effectively shifted burden away from government to prove every element of crime); *Patterson v. New York*, 432 U.S. 197, 210 (1977) (noting that "there are obviously constitutional limits beyond which the States may not go" to reallocate burdens of proof by labeling "at least some elements" of crimes as affirmative defenses); *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975) (holding that government may not shift burden of proof to the defendant by using a presumption to establish an essential ingredient of offense); *In re Winship*, 397 U.S. 358, 364 (1970) (due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime"). With the CPPA, the government has attempted impermissibly to shift the burden of proof to defendants,[18] by recasting the basic, constitutionally required element of knowledge that the image is a minor, *see X-Citement Video*, 513 U.S. at 469, 472 (indicating constitutional requirement that the burden rest with the government, not the defendant, to prove the minority of the person depicted), as an affirmative defense.

III. THE CPPA IS UNCONSTITUTIONALLY OVERBROAD.

The CPPA is impermissibly overbroad because it bans a substantial amount of constitutionally protected speech. The overbreadth doctrine requires the facial invalidation of statutes that prohibit some unprotected speech but, by their scope, also reach a substantial amount of constitutionally protected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). "In such cases, it has been the judgment of this Court that the possible

[18] The government concedes as much in its brief. Pet. Br. at 27 ("Congress was concerned that the government would be unable to meet its burden of proving that a pornographic image is of a real child.").

harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Id.* As discussed above, the government has no compelling interest in criminalizing non-obscene images that do not depict actual children. As a result, even if the statute covers some unprotected speech, the "appears to be" and "conveys the impression" language of the Act are impermissibly overbroad.

The government asserts that this statute is not overbroad, relying on this Court's rejection of an overbreadth claim in *Ferber*. *See* Pet. Br. at 51-53. The reach of the statute at issue in *Ferber*, however, was far less extensive than the that of the CPPA. "While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the statute." *Ferber*, 458 U.S. at 772. Conversely, because the CPPA's coverage is significantly broader than the law in *Ferber*, its chilling effect is substantially greater. In particular, the CPPA criminalizes two categories of protected expression not covered by, or specifically excluded from, *Ferber*'s definition of child pornography: sexually explicit depictions of youthful-looking adults, and computer-generated images that do not involve any

real children.[19] *See id.* at 762-63.[20]

The resulting impermissible sweep of the statute is substantial. By criminalizing works that do not even involve real minors, without regard to the materials' literary, artistic, scientific, or political value,[21] the Act threatens to silence a great deal of fully protected speech. *See supra* Part I(B)(1). *Amicus* shares the government's desire to deter and punish child molesters and those who trade in actual child pornography. But while those interests are undoubtedly substantial, they do not justify the significant overreaching of the CPPA. Given examples like that of *The Tin Drum*, *amicus* finds no comfort in the government's unenforceable

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[19] Respondents have not challenged the provisions of the CPPA criminalizing so-called "morphed" images of actual children, which have been "created, adapted or modified to appear that an identifiable minor is engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(C).

[20] Similarly, the Ohio statute in *Osborne* contained many exemptions – absent from the CPPA – that supported the Court's rejection of an overbreadth claim in that case. *Osborne*, 495 U.S. at 112-13 & n.9 (statute exempting, among other things, material with "a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose" or possessed or disseminated "by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance").

[21] Although the government acknowledges that the Act raises "serious questions" in cases where "depictions of child pornography are necessary 'in order to produce educational, medical, or artistic works,'" Pet. Br. at 53 n.9 (quoting *Ferber*, 458 U.S. at 773), it rejects the notion that "the First Amendment requires some type of serious value defense." *Id.* *Amicus* strongly disagrees, and believes that, at the very least, this defense must be available to works that do not involve actual minors.

reassurances[22] that the Act will not be exploited to its textual limits.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals holding the challenged provisions of the CPPA unconstitutional should be affirmed.

Respectfully submitted,

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[22] The government tries to minimize the threat of unduly expansive enforcement of the CPPA, asserting that "the Act does not apply to visual materials in which sexually explicit conduct by children is understood to be taking place, as long as the sexually explicit conduct is not itself visually depicted." Pet. Br. at 52-53. This limitation, however, is absent from the statute itself, and there simply is no reason to think that prosecutors across the country will adhere to it.

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JOHN D. ASHCROFT, et al.,

Petitioners,

v.

THE FREE SPEECH COALITION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, INSTITUTE FOR THE ADVANCED STUDY OF HUMAN SEXUALITY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, FEMINISTS FOR FREE EXPRESSION, SOCIETY OF PROFESSIONAL JOURNALISTS, AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AS AMICI CURIAE, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTERESTS OF THE AMICI 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

Introduction 5

I. THE CPPA EXCEEDS THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF REGULATION OF NONOBSCENE SEXUALLY EXPLICIT SPEECH 6

A. This Court Has Recognized That Even Child Pornography Laws Are Limited by the First Amendment 6

B. Despite this Court's Caution in *Ferber*, Child Pornography Laws Have Been Applied in an Overbroad Manner That Threatens Legitimate Speech and Research 9

C. The CPPA Closes off the Only Avenue Left Open by *Ferber* for Legitimate Creators and Users of Prohibited Material – Material That Does Not Involve Real Children 13

II. EASING THE GOVERNMENT'S CONSTITUTIONALLY-REQUIRED BURDEN OF PROOF FOR IMPOSING CRIMINAL PENALTIES ON SPEECH IS NOT A COMPELLING INTEREST THAT JUSTIFIES THE CPPA 15

III. THE GOVERNMENT CANNOT OUTLAW SPEECH BASED ON THE ASSUMPTION THAT IT MAY CAUSE SOME VIEWERS TO ACT ILLEGALLY 19

TABLE OF CONTENTS – Continued

Page

A. The Evidence Does Not Support a Connection Between Virtual Child Pornography and Actual Harm to Minors 19

B. The CPPA Violates this Court's Well Established Limits for Punishing Speech on the Theory That it May Encourage Others to Engage in Unlawful Behavior 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

44 Liquormart v. Rhode Island,
517 U.S. 484 (1996) 20

American Amusement Machine Ass'n v. Kendrick,
244 F.3d 572 (7th Cir. 2001) 21, 26

American Booksellers Ass'n v. Hudnut,
771 F.2d 323 (7th Cir. 1985), *affd*, 475 U.S. 1001 (1986) 27, 28

Brandenburg v. Ohio,
395 U.S. 444 (1969) 5, 19, 25, 28

Brogan v. United States,
522 U.S. 398 (1998) 14

Butler v. Michigan,
352 U.S. 380 (1957) 26

Carey v. Population Services Int'l,
431 U.S. 678 (1977) 26

Collin v. Smith,
578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) 28

DeJonge v. Oregon,
299 U.S 353 (1937) 28

Denver Area Educational Telecommunications Consortium v. Federal Communications Commission, 518 U.S. 727 (1996) 1

Eclipse Enterprises, Inc. v. Gulotta,
134 F.3d 63 (2d Cir. 1997) 27

Edenfield v. Fane,
507 U.S. 761 (1993) 20

TABLE OF AUTHORITIES – Continued

Page

Francis v. Franklin,
471 U.S. 307 (1985) 17

Greater New Orleans Broadcasting Ass'n v. U.S.,
527 U.S. 173 (1999) 20

Herceg v. Hustler Magazine, Inc.,
814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) 25

Hess v. Indiana,
414 U.S. 105 (1973) 26

Kingsley Int'l Pictures Corp. v. Regents,
360 U.S. 684 (1959) 26

Landmark Communications, Inc. v. Virginia,
435 U.S. 829 (1978) 19

Massachusetts v. Oakes,
491 U.S. 576 (1989) 8

Miller v. California,
413 U.S. 15 (1973) 5

New York v. Ferber,
458 U.S. 747 (1982) ..... *passim*

Osborne v. Ohio,
495 U.S. 103 (1990) 8, 22, 28, 29

Penn Dept. of Corrections v. Yeskey,
524 U.S. 206 (1998) 14

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 5, 25

Reno v. ACLU,
521 U.S. 844 (1997) 1

TABLE OF AUTHORITIES – Continued

Page

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 20

Sable Communications v. FCC,
492 U.S. 115 (1989) 19

Sandstrom v. Montana,
442 U.S. 510 (1979) 17

Simon & Schuster v. New York State Crime Victims Board, 502 U.S. 105 (1991) 5

Stanley v. Georgia,
394 U.S. 557 (1969) 28, 29

Turner Broadcasting System, Inc. v. FCC,
520 U.S. 180 (1997) 17

U.S. v. Matthews,
209 F.3d 338 (4th Cir. 2000) 11

U.S. v. Upham,
168 F.3d 532 (1st Cir.), *cert. denied*, 119 S. Ct. 2353 (1999) 7

United States v. Boos,
127 F.3d 1207 (9th Cir. 1997) 16

United States v. Fox,
248 F.3d 394 (5th Cir. 2001) 7

United States v. Lamb,
945 F. Supp. 441 (N.D.N.Y. 1996) 7, 12, 22, 24

United States v. Playboy Entertainment Group, Inc.,
120 S. Ct. 1878 (2000) 5, 19, 20

United States v. Vig.,
167 F.3d 444 (8th Cir.), *cert. denied*, 528 U.S. 859 (1999) 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Wiegand,
812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987) 16

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 5, 8, 9

Urofsky v. Gilmore,
216 F.3d 401 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 759 (2001) 12

Video Software Dealers Ass'n v. Webster,
968 F.2d 684 (8th Cir. 1992) 21, 27

Waller v. Osbourne,
763 F. Supp. 1144 (M.D. Ga. 1992) 27

Watters v. TSR, Inc.,
715 F. Supp. 819 (W.D. Ky. 1989) 27

Wisconsin v. Mitchell,
508 U.S. 476 (1993) 25

Zamora v. Columbia Broadcasting System,
480 F. Supp. 199 (S.D. Fla. 1979) 27

STATE CASES

Olivia N. v. NBC,
126 Cal. App. 3d 488 (1981), *cert. denied*, 458 U.S. 1103 (1982) 27

People v. Ferber,
409 N.Y. Supp. 2d 632 (1978) 8

FEDERAL STATUTES

18 U.S.C. § 2252 3

18 U.S.C. § 2252A(c) 17, 18

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 2256 3

18 U.S.C. § 2256(8) 14

18 U.S.C. § 2422(b) 29

18 U.S.C. § 2423 29

21 U.S.C. § 823(f) 15

STATE STATUTES

Cal. Penal Code § 288 29

Cal. Penal Code § 311.2(e) 8

Cal. Penal Code § 311.4(c) 29

Conn. Gen. Stat. § 53(a) 8

Ga. Code Ann. § 16-12-100(d) 8

N.Y. Penal Code § 235.15(2) 8

LEGISLATIVE HISTORY

Child Pornography Prevention Act of 1995: Hearing before The Senate Comm. on the Judiciary, 104th Cong., 2d Sess., 15 (1996) 16, 20

H.R.Rep. No. 536, 98th Cong., 2d Sess. (1983), reprinted in 1984 U.S.C.C.A.N. 492 7

Sen. Rep. 95-438, 95th Cong. 2d Sess. (1977), reprinted in 1978 U.S.C.C.A.N. 40 11

Sen. Rep. No. 358, 104th Cong., 2d Sess. (1996) 21

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Adelman, *The Constitutionality of Congressional Efforts to Ban Computer Generated Child Pornography*, 14 J. Marshall J. Computer & Info L. 483 (1996) 21

Attorney General's Commission on Pornography, *Final Report* (1986) 22

Becker and Stein, *Is Sexual Erotica Associated with Sexual Deviance in Adolescent Males?*, 19 Int'l J. of Law & Psychiatry 85 (1991) 23

Campagna & Poffenberger, *The Sexual Trafficking in Children* (1988) 24

Densen-Gerner, *Child Prostitution and Child Pornography: Medical, Legal, and Societal Aspects of the Commercial Exploitation of Children*, reprinted in U.S. Dept. of Health and Human Services, *Sexual Abuse of Children: Selected Readings*, 77 (1980) 11

Diamond, *The Effects of Pornography: An International Perspective*, in Elias, et al., *Porn 101*, 223 (1999) 23

Diamond & Uchiyama, *Pornography, Rape and Sex Crimes In Japan*, 22 Int'l J. of Law & Psychiatry 1 (1999) 23

Dubin, *Arresting Images: Impolitic Art and Uncivil Actions* Routledge, 1992 10

Finch, *Adult Seduction of the Child: Effects on the Child*, Medical Aspects of Human Sexuality 170 (Mar. 1973) 12

Fisher & Barak, *Pornography, Erotica and Behavior*, 19 Int'l J. of Law & Psychiatry 65 (1991) 23

TABLE OF AUTHORITIES – Continued

Page

Goldstein, *The Sexual Exploitation of Children* (2nd ed. 1999) 24

Lanning & Burgess, *Child Pornography and Sex Rings*, 53 FBI Law Enforcement Bulletin 10 (Jan. 1984) 22

Marshall, *Assessment, Treatment, and Theorizing About Sex Offenders*, 23 Crim. Just. & Behav. 162 (1996) 11

Report of the U.S. President's Commission on Obsenity and Pornography (1970) 23

Scalia, *A Matter of Interpretation* (1997) 14

Schoettle, *Treatment of the Child Pornography Patient*, 137 Am J. Psychiatry 1109 (1980) 11

Sonnenschein, *Sources of Reaction to "Child Pornography"* in Elias, et al., *Porn 101*, 527 (1999) 11

Tate, *Child Pornography: An Investigation* (1990) 24

Tovar, Elias & Chang, *The Effects of Pornography on Sexual Offending*, in Elias, et al., *Porn 101*, 261 (1999) 23

NEWSPAPER ARTICLES

Bigness, *Sifting Problems of Web Filters*, Chicago Tribune, Feb. 16, 1998 12

Foerstner, *The Family of Mann*, Chicago Tribune, Sept. 19, 1993 10

Galant, *Anger and Pain Over Nude Photos*, The New York Times, July 30, 2000 10

Grace, *Nude-Children Photos Too Weak a Case, DA Says*, The Times-Picayune October 21, 1997 10

TABLE OF AUTHORITIES – Continued

Page

Jacobs, *Grandmother, Nude Photos and Charges*, The New York Times, Feb. 13, 2000 10

Justice Department Won't Prosecute Klein Over Ads, The Wall Street Journal Nov. 16, 1995, ... 11

Lohmann, *Now, What's Wrong With This Picture?*, The Richmond Times Dispatch, Apr. 11, 2000 9

O'Harrow, Jr., *Professors Sue Over Va Law Governing Explicit Material On Internet*, The Washington Post, May 9, 1997 12

Savitskie, *In Macomb County: Library to Block Net Porn from Kids*, The Detroit News, Aug. 13, 1997 12

Smith, *Life Changed in a Day for Mother Accused of Obscenity; Children Remain in Custody*, The Plain Dealer, Nov. 11, 2000 9

Sterngold, *Censorship in the Age of Anything Goes*, The New York Times, Sept. 28, 1998 10

Thomas & Farhi, *Calvin Klein Ads Cleared*, The Washington Post, Nov. 6, 1995 11

Zimmerman, *Photo Processors Face Developing Dilemma: When to Call the Police*, The Wall Street Journal, June 1, 2001 10

INTERESTS OF THE AMICI

Amici are non-profit organizations who fully support efforts by government to prevent sexual abuse or exploitation of children but remain concerned about the rights of publishers, artists, authors, journalists, scholars and citizens to create, distribute, use and possess every kind of expression permitted by the First Amendment.[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. Since its founding in 1920, the ACLU has litigated numerous cases involving issues of freedom of expression and sexually explicit speech including, recently, *Reno v. ACLU*, 521 U.S. 844 (1997) (challenge to Communications Decency Act), and *Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 518 U.S. 727 (1996) (challenge to indecency provisions of Cable Television Consumer Protection and Competition Act of 1992). The ACLU of Northern California is a regional affiliate of the national ACLU.

The Institute for the Advanced Study of Human Sexuality is a private graduate school established in 1976 and based in San Francisco, California. The Institute provides a graduate course of study for persons preparing for careers in human sexuality or already working in the field. The Institute maintains archives, resource centers and research facilities dealing with primary sexological and erotological material not available elsewhere.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation founded in 1958 to ensure justice and due process for persons accused of crime, and to promote the proper and fair

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[1] Pursuant to Rule 37(3)(a), *amici* have obtained the written consents of the parties, which have been lodged with the Clerk. No party wrote any part of this brief or contributed to its financial support.

administration of criminal justice. It has a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states.

Feminists for Free Expression (FFE) is a national not-for-profit organization of diverse feminist women and men who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce expressive materials free from government intervention. Since 1992 it has worked actively to oppose the misapprehension that censorship may sometimes be in the interest of women and others who feel unequally treated by society, believing that the goal of equality is inextricably linked with the values enshrined in our Constitution's free speech clause.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news editors and reporters dedicated to defending the First Amendment and freedom of information interests of the print and broadcast media since 1970.

The Society of Professional Journalists (SPJ) is a voluntary non-profit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

The Radio-Television News Directors Association is a professional organization comprised of local and network news executives, educators, students and others in the radio, television and cable news business and is devoted to electronic journalism.

All *amici* are concerned about the dangers to free speech and inquiry posed by the Child Pornography Prevention Act of 1996 (CPPA).

STATEMENT OF THE CASE

The Free Speech Coalition and others (respondents) filed this facial challenge to the constitutionality of the

CPPA, which amended the federal child pornography law to criminalize not just images of real children engaged in sexual conduct, but any image that "appears to be" or that "conveys the impression" of minors engaged in sexual conduct. 18 U.S.C. §§ 2252, 2256. The district court found, *inter alia*, that the CPPA was content-neutral and was not unconstitutionally vague or overbroad. Pet.App. 50a-65a. The Ninth Circuit Court of Appeals reversed, holding that the CPPA was vague and overbroad in violation of the First Amendment. Pet.App. 1a-43a. After the court below denied a petition for rehearing, this Court granted the government's petition for a writ of certiorari on January 22, 2001.

SUMMARY OF ARGUMENT

The CPPA creates a new category of criminally prohibited speech: nonobscene "child pornography" that neither depicts real children nor uses children in its production. The plain language of the "appears to be" and "conveys the impression" provisions of the CPPA criminalizes a wide variety of images, including those of young-looking adults as well as minors in paintings, drawings and sculpture, and those created and used for serious literary, artistic, political or scientific purposes.

Amici agree with the court below that the "appears to be" and "conveys the impression" provisions are facially unconstitutional and are far too subjective and vague for use in a criminal statute restricting speech. *Amici* confine this brief to three points:

1.

Despite this Court's caution in *New York v. Ferber*, 458 U.S. 747 (1982), child pornography laws have been used to justify suppression and prosecution of legitimate speech and research ranging from parental photographs of nude children in the bathtub to journalistic investigation of the role of law enforcement in online child pornography prosecutions and medical treatment of

pedophilia. By cutting off the only avenue of protected speech left open for legitimate speech and research – images that do not involve real children – the CPPA expands the overbreadth of the child pornography prohibition to the point of unconstitutionality.

2.

The government argues in this Court that the CPPA provisions are justified because advances in technology have made it difficult for the government to meet its burden to prove that a defendant possessed or distributed images of actual minors – that is, to prove that the speech is unprotected – before obtaining a conviction. The government argues that the CPPA will make it easier to obtain convictions for child pornography, and that an affirmative defense is available to some defendants who can prove that the images were produced using adults. But the defense is unavailable to a wide range of defendants, including all those charged with possession rather than distribution, creators who use neither real adults nor real children, and distributors who have no way to prove that an adult was used to produce the images. Thus, rather than justifying the law, the reversal of the burden of proof inherent in the CPPA exacerbates its constitutional defects.

3.

The government contends that virtual pornography – images that neither depict real minors nor use real minors in its production – has no First Amendment protection because the images can lead to actual child molestation. Its contention is based on Congressional "findings" that such images may "whet the appetite" of potential molesters and be used to seduce actual minors. The government submitted no evidence in this case, and the Congressional findings are not based on reliable evidence. In addition, while government may of course proscribe actual child exploitation, the First Amendment

does not allow the suppression of speech based on the assumption that it may cause some viewers to engage in illegal acts unless the speech is directed to inciting imminent unlawful action and is likely to produce such action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

ARGUMENT

Introduction

In 1984, Congress acted to "expand the child pornography statute to its full constitutional limits." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 74 (1994). In 1996, Congress exceeded those limits. It created an entire new category of criminally prohibited speech: non-obscene "child pornography" that neither depicts real children nor uses children in its production. As the court of appeals observed, "Images that are, or can be, entirely the product of the mind are criminalized." Pet.App. 16a.

The CPPA criminalizes materials that, by definition, may not appeal to the prurient interest, may not be patently offensive and may well have serious literary, artistic, political or scientific value. *Cf. Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity). "Child pornography" has heretofore been confined to materials depicting actual minors performing sexual acts. *See New York v. Ferber*, 458 U.S. 747 (1982).

Prohibitions of both obscenity and child pornography are "unabashedly content-based laws." *See New York v. Ferber, supra*, 458 U.S. at 756. They "run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." *Id.* The proper analysis therefore starts with the *presumption* that the CPPA's content-based restrictions on speech are "beyond the power of the government." *Simon & Schuster v. New York State Crime Victims Board*, 502 U.S. 105, 115-16 (1991); *see United States v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878, 1888 (2000), quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively

invalid"). As will be seen, the government's showing in this case does not overcome that presumption.

I. THE CPPA EXCEEDS THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF REGULATION OF NON-OBSCENE SEXUALLY EXPLICIT SPEECH

A. This Court Has Recognized That Even Child Pornography Laws Are Limited by the First Amendment

In *New York v. Ferber*, the Court upheld a state child pornography law that criminalized images of actual minors engaged in sexual conduct that were not obscene. The Court recognized that child pornography laws are nonetheless limited by the First Amendment in two ways. First, the Court noted that applications of child pornography laws to material or research with serious value might violate the First Amendment. 458 U.S. at 773-74. It held that these overbroad applications "should be cured through case-by-case analysis of the fact situations to which [the statute's] sections . . . may not be applied." *Id.* at 774. Four concurring justices expanded on the overbreadth issue. Justice O'Connor noted that "clinical pictures of adolescent sexuality" and "pictures of children engaged in rites widely approved by their cultures" might not "trigger the compelling interests identified by the Court." *Id.* at 775. Similarly, Justices Brennan and Marshall opined that the use of materials otherwise within the ambit of the statute may be protected by the First Amendment if they form part of a work having serious literary, artistic, scientific, or medical value. *Id.* at 776-77. Justice Stevens explicitly noted that the First Amendment would also protect images that fit squarely within the prohibition if used for legitimate purposes:

> A holding that respondent may be punished for selling these two films does not require us to conclude that other users of these very films, or

> that other motion pictures containing similar scenes, are beyond the pale of constitutional protection. Thus, the exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime. Moreover, it is at least conceivable that a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films and, when viewed as a whole in a proper setting, be entitled to constitutional protection.

Id. at 778. Other courts have suggested similar limitations on the reach of child pornography laws.[2] *See United States v. Lamb*, 945 F.Supp. 441, 449-50 (N.D.N.Y. 1996) (recognizing need for a "legitimate use" defense for researchers, psychiatrists, etc.); *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001) (same for artists); *U.S. v. Upham*, 168 F.3d 532, 534 (1st Cir.), *cert. denied*, 119 S. Ct. 2353 (1999) (noting

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[2] In addition, when amending the federal child pornography law to conform with *Ferber* in 1984, Congress considered whether to include an explicit affirmative defense for "serious literary, artistic, scientific, social or educational value." After considering the following testimony from the Department of Justice that such a defense was unnecessary, Congress did not enact an explicit defense: "Even in the absence of the affirmative defense provided in H.R. 2432, a defendant may take the position that the application of the child pornography statute to his case is unconstitutional and falls within the 'tiny fraction of the materials within the statute's reach' which the Court recognized should receive constitutional protection. 458 U.S. at 772-74. Thus, the affirmative defense provision (which was not in the New York statute approved by *Ferber*) is unnecessary." H.R.Rep. No. 536, 98th Cong., 2d Sess. 13 (1983), reprinted in 1984 U.S.C.C.A.N. 492, at 504 (testimony of Mark M. Richard, Dep. Ass't Atty. Gen.).

submission to jury of whether defendant's purpose in possessing child pornography was to produce a serious literary work). In addition, some state child pornography statutes contain explicit exceptions for work with serious value. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 106 (1990) (Ohio statute contains exception for material used for "bona fide artistic, medical, scientific, educational . . . or other proper purpose"); *Massachusetts v. Oakes*, 491 U.S. 576, 579 (1989) (state statute contains exception for material "produced . . . for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library."); Conn. Gen. Stat. § 53(a) (2001) (exception to state child pornography statute for images possessed for "bona fide artistic, medical, scientific, educational, religious, governmental or judicial purpose."); Cal. Penal Code § 311.2(e) (2001) (same); Ga. Code Ann. § 16-12-100(d) (2001) (same); N.Y. Penal Code § 235.15(2) (McKinney 2000) (same).

Second, the *Ferber* Court specifically offered constitutionally protected alternatives to the speech prohibited by the statute. For example, the Court suggested the use of young-looking adults or other simulations as a constitutionally protected substitute for the use of actual minors and, in part, justified its own holding by pointing to the availability of such a constitutionally protected alternative. 458 U.S. at 763. The Court thus noted that "a person over the statutory age who perhaps looked younger could be utilized," and that "simulation" could "provide another alternative." 458 U.S. at 763. Rejecting the idea that simulation might be unlawful, the Court held that material that does "not involve *live* performance or photographic or other visual reproduction of *live* performances, retains First Amendment protection." 458 U.S. at 765 (emphasis added); *see also People v. Ferber*, 409 N.Y. Supp. 2d 632, 637 (1978) (noting that state itself had offered these protected alternatives). In *X-Citement Video*,

supra, the Court reiterated that nonobscene sexually explicit materials involving adults "are protected by the First Amendment." 513 U.S. at 72.

B. Despite this Court's Caution in *Ferber*, Child Pornography Laws Have Been Applied in an Overbroad Manner That Threatens Legitimate Speech and Research

Before considering the constitutionality of the CPPA's *expansion* of the federal child pornography law, *amici* wish to make the Court aware of the very real impact of child pornography laws on legitimate speech and research even before enactment of the CPPA. The *Ferber* Court's acknowledgement of the constitutional limitations of imposing criminal liability for nonobscene child pornography has not stopped the threat to protected speech. Child pornography has in essence become a strict liability crime for many, including legitimate academics, artists, journalists and sex researchers, who can no longer safely create or possess images even in circumstances that do not implicate the government interests identified in *Ferber*. Prosecutors have unbridled discretion in deciding whom to target. Grandparents and parents have been prosecuted for taking nude photos of their children and grandchildren; some either take years to mount a successful First Amendment defense, or opt to enter pleas to avoid protracted litigation.[3] Artists, museum directors,

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[3] *See* Bill Lohmann, "Now, What's Wrong With This Picture?," *The Richmond Times Dispatch*, Apr. 11, 2000 (discussing prosecution of Cynthia Stewart in Oberlin, Ohio, for photographs of her 8-year-old daughter in the bathtub, and stating Ms. Stewart's belief that she did nothing wrong but "agreed to enter a counseling program rather than go to trial [have her child testify in court] and face 16 years in prison if convicted"); Robert L. Smith, "Life Changed in a Day for Mother

advertisers, and mainstream booksellers have had their works seized and been threatened with prosecution.[4] An

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Accused of Obscenity; Children Remain in Custody," *The Plain Dealer*, Nov. 11, 2000 (discussing frequency of mothers who take pictures of their children being charged with exploiting them, and mentioning Cynthia Stewart case); Andrew Jacobs, "Grandmother, Nude Photos and Charges," *The New York Times*, Feb. 13, 2000 (discussing prosecution of Marian Rubin, a 66-year-old grandmother, social worker and amateur photographer in Montclair, New Jersey, for nude photographs of her granddaughters; also discussing earlier case involving Ejlat Feuer, a photographer who in 1994 faced child pornography charges based on nude photos of his daughter; though the charges were ultimately dropped, Mr. Feuer spent $80,000 to defend himself, and stated, "I don't know if I'll ever reconcile what happened to me and my family."); Debra Galant, "Anger and Pain Over Nude Photos," *The New York Times*, July 30, 2000 (reporting that grandmother Marian Rubin agreed to be placed in a pretrial intervention program without admitting guilt, and noting $25,000 in legal fees for defense); Zimmerman, "Photo Processors Face Developing Dilemma: When to Call the Police," *The Wall Street Journal*, June 1, 2001 (jailing of Marian Rubin).

[4] *See* Stephen Dubin, *Arresting Images: Impolitic Art and Uncivil Actions* (Routledge, 1992), pp. 170-90 (discussing 1990 prosecution and ultimate acquittal of Cincinnati museum director for child pornography charges based on Robert Mapplethorpe exhibit); James Sterngold, "Censorship in the Age of Anything Goes," *The New York Times*, September 28, 1998 (citing indictments of Barnes & Noble bookstores in Alabama and Tennessee for carrying books alleged to be child pornography, including works by Jock Sturges and David Hamilton); Stephanie Grace, "Nude-Children Photos Too Weak a Case, DA Says," *The Times-Picayune*, Oct. 21, 1997 (discussing ultimate decision of Louisiana District Attorney from Jefferson Parish not to bring criminal charges against Barnes & Noble for selling books by Jock Sturges and Sally Mann); Abigail Foerstner, "The Family of Mann," *Chicago Tribune*, September 19, 1993 (referring to state and federal authorities confiscating photographs and equipment from Jock Sturges though

award-winning journalist has been imprisoned after a court refused to let him present evidence that he was in fact investigating and reporting on the problem of child pornography on the Internet. *U.S. v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (denying journalist's First Amendment defense that illegal images were possessed as part of news investigation), *cert. denied*, 121 S.Ct. 260 (2000).

Sex researchers have had to limit their research of child pornography and even to abandon proven clinical techniques for assessing the treatment of sex offenders.[5]

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ultimately a grand jury refused to indict him); Pierre Thomas & Paul Farhi, "Calvin Klein Ads Cleared," *The Washington Post*, November 16, 1995 (discussing Justice Department inquiry into whether fashion ads featuring adults in underwear could lead to prosecution as child pornography because the models looked "underage"); "Justice Department Won't Prosecute Klein Over Ads," *The Wall Street Journal*, November 16, 1995 (Justice Department decision not to prosecute Calvin Klein for ads condemned by some as child pornography).

[5] *See, e.g.*, W.L. Marshall, *Assessment, Treatment, and Theorizing About Sex Offenders*, 23 Crim. Just. & Behav. 162 (1996) (reviewing research by Marshall and others about child pornography over the past twenty years); Sonnenschein, *Sources of Reaction to "Child Pornography"*, in Elias, et al., *Porn 101*, 527-31 (1999) (describing concerns over use of "The Inevitable Comparison" photographs for scholarly conference). The chilling effect on legitimate research is particularly ironic because Congress itself relied on such research when passing the prior version of the federal law. *See* Sen. Rep. 95-438, 95th Cong. 2d Sess. at 4 (1977), reprinted in 1978 U.S.C.C.A.N. 40, 42 (citing Robin Lloyd, *For Money or Love: Boy Prostitutes in America*, which documented more than 260 magazines depicting minors engaged in sexually explicit conduct). This Court cited similar studies in *New York v. Ferber*, 458 U.S. at 758 n.9 (citing Schoettle, *Treatment of the Child Pornography Patient*, 137 Am. J. Psychiatry 1109 (1980); Densen-Gerner, "Child Prostitution and Child Pornography: Medical, Legal, and Societal Aspects of the Commercial Exploitation of Children," reprinted in U.S. Dept.

The climate for legitimate research has become so fearful that scholars and researchers did not want their articles cited in this brief for fear of scrutiny, and some professional sex research associations declined to join this amicus brief out of fear that their participation could subject their members to scrutiny and potential criminal liability for their research. Sociology professors have also been threatened with prosecution for studying the role of pornography in modern society. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 759 (2001); Robert O'Harrow, Jr., "Professors Sue Over Va Law Governing Explicit Material On Internet," *The Washington Post* May 9, 1997 (discussing censorship of professor's web site). Even criminal defense attorneys do not have an exception to possess images to assist them in the defense of their client.

On the other side of the coin, certain persons who possess and receive child pornography involving real children appear to enjoy immunity from prosecution. For example, companies that market Internet blocking programs employ hundreds of staff members who download illegal child pornography to add to the programs' lists of sites to block. Jon Bigness, "Sifting Problems of Web Filters," *Chicago Tribune*, February 16, 1998; Jeffrey Savitskie, "In Macomb County: Library to Block Net Porn From Kids," *The Detroit News*, August 13, 1997. In addition, the brief of the National Center for Missing & Exploited Children in this case discusses its possession

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of Health and Human Services, *Sexual Abuse of Children: Selected Readings* 77 (1980); Finch, *Adult Seduction of the Child: Effects on the Child*, Medical Aspects of Human Sexuality 170 (Mar. 1973)). As one district court has recognized, "[i]t is difficult to imagine how a researcher today could catalog so many publications of this sort without running afoul of the child pornography law." *U.S. v. Lamb*, 945 F.Supp. 441, 450 n.4 (N.D.N.Y. 1996).

and review of illegal images. *See* Amicus Curiae Brief of National Center for Missing & Exploited Children, at 8 ("NCMEC analyzes all reported images of child pornography to determine whether a violation of federal child pornography laws may have occurred. . . . "); *id.* at 18 ("Reports of apparent child pornography are forwarded to NCMEC, where trained analysts triage the images and assign a priority value to the report" before sending to law enforcement).

Against this background, Congress opted to *expand* the definition of child pornography in the CPPA well beyond constitutional limits.

C. The CPPA Closes off the Only Avenue Left Open by *Ferber* for Legitimate Creators and Users of Prohibited Material – Material That Does Not Involve Real Children

The only clear safety valve left to creators and users of legitimate speech involving minors and sexual conduct under *Ferber* was sexually explicit material that used fictitious minors. The CPPA's criminal penalties unconstitutionally close that safety valve. Despite the government's attempt to narrow the statute to apply only to computer-generated images that are "virtually indistinguishable" from images of actual minors, the plain language of the statute outlaws sexually explicit depictions of young-looking adults in films, photographs, videos, etc., depictions of children in paintings, drawings, cartoons, video games, anatomically correct dolls, sculpture, etc.,[6] and computer-generated or photo composite images that do

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[6] If an artist created a parody of the famed "Mannequin Pis" statue in Brussels, Belgium (of a cherubic boy urinating into a fountain), perhaps giving the boy an erection, the sculpture (and certainly a "photograph" of it) would fall within the statutory language.

not involve real minors. All of these easily fit within the open-ended "visual depiction" provision of § 2256(8).[7] The CPPA, by redefining certain sexually explicit materials as child pornography, is invalid because it directly proscribes constitutionally protected speech.

Even if case-by-case adjudication of overbroad applications might have protected legitimate speech and research before the CPPA, the CPPA's expansion of liability to nonobscene images of fictitious minors burdens protected speech to the point of facial unconstitutionality. Under *Ferber*, legitimate speakers and researchers could avoid prosecution by creating or using images that did not involve real children. For example, photographers and filmmakers could use young-looking adults. Sex researchers could study and use similar or fictitious images for research and to treat patients. These very alternatives were expressly contemplated by this Court in *Ferber*, in part to limit the impact of the law on legitimate speech and research. Because the CPPA eliminates the ability to create or use even fictitious images of minors engaged in sexual conduct, it is unconstitutional.

As a particularly ironic example of the statute's overbreadth, the CPPA now makes criminal many of the studies that could inform the Court's analysis of whether the government has proven the harm that it alleges. Sex researchers cannot study the impact of virtual child pornography to determine whether it "whets the appetite" of the viewer. They cannot determine whether there is a

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[7] The Court will not limit the reach of a statute where its plain language has not been qualified by Congress. *Penn Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998); *Brogan v. United States*, 522 U.S. 398, 408 (1998). As Justice Scalia has put it, "The text is the law, and it is the text that must be observed." Scalia, *A Matter of Interpretation*, 22 (1997).

connection between viewing certain images and committing sex crimes. Journalists cannot analyze whether the market for virtual child pornography is actually increasing on the Internet. The government has now made a category of speech so illegal that society can no longer have informed debates about the premises of that illegality. Scientists studying the harmful effects of illegal drugs are granted licenses that entitle them to possession for research purposes, 21 U.S.C. § 823(f), while scientists wanting to examine the harmful effects from child pornography – though it is speech – face prosecution for possessing contraband.

II. EASING THE GOVERNMENT'S CONSTITUTIONALLY-REQUIRED BURDEN OF PROOF FOR IMPOSING CRIMINAL PENALTIES ON SPEECH IS NOT A COMPELLING INTEREST THAT JUSTIFIES THE CPPA

To justify the CPPA, the government now argues that, absent the "appears to be" provision, it will be unable to meet its burden of proof in child pornography prosecutions. Pet.Br. 23-24, 37. Before the CPPA, child pornography prosecutions required the government to prove that the defendant possessed or distributed images of an actual minor. The requirement was imposed by this Court in *Ferber*, whose rationale for allowing a state to ban nonobscene child pornography is the harm to the minors exploited in the material's production.[8] Lower courts

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[8] The Court said so no fewer than 15 times: 458 U.S. at 749 ("exploitive use of children in the production of pornography"), 750 ("use of a child in a sexual performance"), 753 ("sexual activity involving children"), 758 ("use of children as subjects"), 758 n.9 ("sexually exploited children"; "molestation by adults is often involved in the production of child sexual performances"); 759 ("permanent record of the children's

following *Ferber* have continued to emphasize that the victims of child pornography "are the children who participate in the pornography's production." *United States v. Boos*, 127 F.3d 1207, 1213 (9th Cir. 1997); *United States v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987) (rationale of prohibiting child pornography is to ensure that the child "target" of the "pornographer-photographer" not be "treated as a thing").

The government's new argument is simply an effort to lighten its own burden to prove that speech is unprotected before sending a speaker to jail. It exacerbates the constitutional defects in the statute for several reasons. First, the government has failed to cite a single instance of its inability to win a conviction. Despite its experience in hundreds and hundreds of child pornography prosecutions, it has adduced no evidence that it has actually been prevented from proving its case. In fact, at the Senate hearing on the CPPA, the Deputy Assistant Attorney General testified that in a recent year there were "no acquittals" and "1995 saw the highest conviction rate for child pornography cases – 97.6 percent." Child Pornography Prevention Act of 1995: Hearing before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess., 15 (1996) ("Senate Hearing").[9] Congress did not have

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participation"), 759 n.10 (depiction of child "may haunt him in future years"; "fear of exposure and the tension of keeping the act secret" cause harm), 761 (issue is "whether a child has been physically or psychologically harmed in the production of the work"), 762 ("live performances and photographic reproductions of children engaged in lewd sexual conduct"), 764 ("children engaged in its production"; "sexual conduct by children"), 771 ("employment of children to make sexually explicit materials"), 773 ("employ children to engage in conduct").

[9] As for the cases cited in the government's brief (Pet.Br. 37 & n.8), they all resulted in convictions and each defendant's

"substantial evidence" on which to base its "finding" on the burden of proof point. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997).

Second, the government is essentially arguing that it has a compelling interest in criminalizing protected speech (images of fictitious minors) because it will aid the prosecution of unprotected speech (images of actual minors). Under that rationale any overbroad censorship law could be justified – banning protected speech in order to stamp out illegal speech will always make the government's job easier. That constitutional shortcut is precisely what the overbreadth doctrine is designed to prevent. Under *Ferber*, moreover, use of underage children is a constitutionally essential element of the crime. As a matter of due process, the government must prove all elements of the crime beyond a reasonable doubt. *See, e.g., Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979).

Third, the government argues that any constitutional problems presented by reversing the burden of proof are cured by the affirmative defense, protecting the defendant if the images were produced using a person who "was an adult at the time the material was produced" and "the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is . . . a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C.

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argument was unsuccessful. In *United States v. Vig.*, 167 F.3d 444, 450 (8th Cir.), *cert. denied*, 528 U.S. 859 (1999), the court held that the government's burden was not so onerous: the government was not "required to negate what is merely unsupported speculation . . . Proof beyond a reasonable doubt does not require the government to produce evidence which rules out every conceivable way the pictures could have been made without using real children."

§ 2252A(c). On its face, this defense applies only to liability for *distribution* (§ 2252A(1)-(4)), and not for *possession* (§ 2252(5)), even by legitimate researchers. *See* § 2252A(c). Thus, possessors have no defense *even if* they can prove that real adults and not minors were used to produce the images.[10] In addition, mainstream filmmakers who use adult actors to portray teenage sexual conduct – including Nabokov's *Lolita*, Shakespeare's *Romeo and Juliet*, and Alice Walker's *The Color Purple* – have no defense if they distribute or advertise images that "convey the impression" that minors are engaged in sexual conduct. Any portrayal of minors engaged in sexual conduct for any purpose whatsoever is criminal.

In addition, the defense is practically unavailable to all distributors who did not participate in production. It would be difficult if not impossible for each distributor to prove that the persons depicted are adults. Even creators of prohibited images have no defense if they did not use real persons at all, but rather created cartoons, drawings or computer-generated images that appear to be of minors (which could include sex educators who use drawings to demonstrate safer sex practices).

Because the defense is unavailable to most defendants who possess or distribute images that appear to be of minors, it magnifies rather than cures the CPPA's overbreadth. The irony of the limited statutory defense is that it will protect some commercial pornographers (if they can prove adults were used as models), while sending researchers and artists to prison.

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[10] The very existence of the defense makes it clear that the statute in fact covers images of real adults and is not limited to computer-generated images. *See* discussion accompanying n.7, *supra*.

III. THE GOVERNMENT CANNOT OUTLAW SPEECH BASED ON THE ASSUMPTION THAT IT MAY CAUSE SOME VIEWERS TO ACT ILLEGALLY

A. The Evidence Does Not Support a Connection Between Virtual Child Pornography and Actual Harm to Minors

The government argues that pictures of what "appear to be" minors must be criminalized because they lead to the commission of illegal sexual acts. It states that virtual child pornography can be "used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites," Pet.Br. 23, and to seduce reluctant minors into sexual activity. As the court below correctly held, this argument fails for two reasons. First, as the court of appeals noted, the government has not proven that there is in fact a causal connection between seeing sexually explicit images of fictitious minors and actual child molestation. Pet.App. 20a. Second, the government may not ban *all* images under the hypothesis that they might cause *some* viewers to engage in illegal acts; speech may not be suppressed unless the government proves that it incites imminent unlawful action and is likely to produce such action. *Brandenburg v. Ohio, supra*, 395 U.S. at 447.

The Court cannot simply accept at face value the "findings" recited by Congress as establishing the facts necessary for the government to meet its First Amendment burden. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Sable Communications v. FCC*, 492 U.S. 115, 129 (1989); *see also United States v. Playboy Entertainment*

Group, Inc., 120 S.Ct. 1878, 1886-93 (2000).[11] Even when the restriction is on "commercial" speech and is not a criminal prohibition, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173, 188 (1999), quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *accord*, *44 Liquormart v. Rhode Island*, 517 U.S. 484, 505-07 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

The government offered no evidence whatever in this case. It relies solely on the congressional "findings." The findings are not grounded in reliable evidence. Conspicuously lacking is any evidence demonstrating that the use of *computer-generated images that do not involve real minors* is a serious problem and that the statutory prohibition will advance the government's interest in preventing child abuse in a direct and material way.[12] The "findings"

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[11] In *Playboy*, the Court invalidated a statute regulating sexually-oriented programming on cable television, a statute designed to protect children from exposure to images of sexual behavior. The Court refused "to give the Government the benefit of the doubt when it attempt[s] to restrict speech" and insisted that "the Government bears the burden of proving the constitutionality of its actions." 120 S.Ct. at 1888. The Court found unpersuasive the "anecdotal evidence" relied upon by the government and pointed out that there was "little hard evidence of how widespread or how serious" the particular problem was. *Id.* at 1889-90.

[12] As the court of appeals observed, the Senate in fact recognized that banning "entirely computer-generated images might render the law unconstitutional." Pet.App. 28a, n.11. The Senate Committee was warned by the author of the Attorney General's Commission on Pornography Final Report that this would "highly likely" be unconstitutional. Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess., 43 (1996) ("Senate Hearing")

were based on a brief committee hearing on one day. Senate Rep. No. 358, 104th Cong., 2d Sess., 8 (1996) ("Senate Report"). Regarding child abuse involving computer-generated images, the government's chief legislative witness, Di Gregory, testified that he was "not aware of any of this that we have run across in actual prosecutions, and I don't recall as I sit here whether or not we have come across this in investigations." Senate Hearing at 30.[13] As the court of appeals observed, there are no factual studies establishing a link between computer-generated child pornography and subsequent sexual abuse of children. Pet.App. 20a, citing Adelman, *The Constitutionality of Congressional Efforts to Ban Computer Generated Child Pornography*, 14 J. Marshall J. Computer & Info L. 483, 490 (1996). There was no evidence before Congress that computer simulations have *ever* been used in child abuse. *Cf. American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001) (studies "do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere"); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992) (invalidating statute designed to protect minors against violence on television).

Indeed, there was no evidence before Congress that computer-generated images of virtual minors is a widespread or serious problem at all. There was anecdotal evidence at the Senate hearing that pornography might be used to recruit minors for sex, but *adult* sexually oriented materials, "mostly materials not even close to

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(testimony of Prof. Frederick Schauer); *see also* Sen. Rep. No. 358, 104th Cong., 2d Sess., at 36-37 (minority views of Sen. Feingold).

[13] Senator Grassley immediately requested that Di Gregory submit additional material on this crucial point (*id.* at 30), but the record does not contain any such additional material.

being legally obscene, are even more often used for the same purpose."[14] Even "the underwear pages of mail order catalogues" may be used. Senate Hearing at 45.[15]

In general, the published social science research concludes that there is no demonstrable causal link between

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[14] Senate Hearing at 45 (testimony of Prof. Frederick Schauer) (emphasis added). Prof. Schauer was the author of the Report of the Attorney General's Commission on Pornography. *Id.* at 113. The Commission stated that *adult* pornography is used to seduce children. *See Osborne v. Ohio, supra,* 495 U.S. at 143-44 n.18 (Brennan, J., dissenting); Attorney General's Commission on Pornography, *Final Report,* 461, n.74 (1986). The Commission found, however, that such evidence was not sufficient to justify additional restrictions on adult pornography. *Final Report* at 461, n.74. The Commission also did not consider *fictional* depictions to be child pornography at all, even though they might be prosecutable if "obscene." *Final Report* at 405. The Commission explained that child pornography is "not so much a form of pornography as it is a form of exploitation of children. The distinguishing characteristic of child pornography, as generally understood, is that *actual children* are photographed while engaging in some form of sexual activity . . . " *Id.; see also id* at 406 ("child pornography includes the sexual abuse of a *real child*") (emphasis added); *id.* at 597; therefore, "child pornography *is* child abuse." *Id.* at 406 (emphasis in original).

[15] One court referred to research done by an FBI Special Agent who specializes in child abuse cases, Kenneth V. Lanning. *See United States v. Lamb,* 945 F.Supp. 441, 450 (N.D.N.Y. 1996). The empirical study, based on a sample of 40 child abusers, reviewed their modus operandi and noted that they seduce their victims by a variety of "pressures," including giving "money, gifts and affection." Lanning & Burgess, *Child Pornography and Sex Rings,* 53 FBI Law Enforcement Bulletin 10, 12 (Jan. 1984). The study found that "Pedophiles are skilled at the seduction process. They know how to use bribes, attention, affection, adult authority, and even threats" to get their victims to do their bidding. *Id.* The study made *no mention* of any seduction by the use of any type of pornography.

any type of pornography and sexual offenses. *E.g.,* Diamond, *The Effects of Pornography: An International Perspective,* in Elias, et al., *Porn 101,* at 223, 241-42 (1999); *accord,* Tovar, Elias & Chang, *The Effects of Pornography on Sexual Offending,* in *Porn 101, supra,* at 261, 272. This is also the finding of the research commissioned by the 1970 Presidential Commission on Obscenity and Pornography:

> In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency.

Report of the U.S. President's Commission on Obscenity and Pornography, 27, 139 (1970).[16]

Both Diamond and the Tovar authors exhaustively review the research and find, for example, that despite the increased availability of pornography, sex crimes have *decreased*: "there is an *inverse* causal relationship between any increase in pornography and sex crimes." Diamond, in *Porn 101, supra,* at 241 (emphasis in original); *see* Fisher & Barak, *Pornography, Erotica and Behavior,* 19 Int'l J. of Law & Psychiatry 65, 74 (1991); Diamond & Uchiyama, *Pornography, Rape and Sex Crimes in Japan,* 22 Int'l J. of Law & Psychiatry 1, 19 (1999); Diamond, *Porn 101, supra,* at 243, 247; Becker and Stein, *Is Sexual Erotica Associated with Sexual Deviance in Adolescent Males?* 19 Int'l J. of Law & Psychiatry 85, 93 (1991).

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[16] The Attorney General's Commission did find a link (*see* note 14, *supra*), but the "Meese" Commission did not commission any research and this finding has been criticized as largely political. *E.g.,* Diamond, *supra,* at 226.

The government cites some "available secondary literature" as confirming that pedophiles use child pornography to seduce other children into sexual activity, or for their own arousal. Pet.Br. 35, n.6. But nothing in the cited literature even mentions computer-generated images. Moreover, the authors – like the witnesses at the Senate hearing – are by and large not scientific researchers but law enforcement officers or anti-pornography advocates.[17] And the conclusory quotations excerpted in the government's citations do not cite any research or study on which they could be validly based. Indeed, there was no valid evidence before Congress on which to predicate the "virtually indistinguishable" conclusion enacted as the "finding" on which all of the government's arguments depend.

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[17] Seth Goldstein, the author of *The Sexual Exploitation of Children* (2d ed. 1999), is a former Berkeley police officer who did no independent research for his law enforcement manual. Shirley O'Brien's 1983 book long predates the technology at issue here. Tim Tate, *Child Pornography: An Investigation* (1990), written by a reporter, is out of print. Campagna and Poffenberger, who were at least academics (Castleton State College and West Virginia Northern Community College), limited their discussion of child pornography – so as to avoid "highly subjective" and "complex" definitional issues – to photographs that "show minors engaged in sexual activities with adults, other children and animals," *The Sexual Trafficking in Children* 117 (1988), the kind of material addressed by *New York v. Ferber*, 458 U.S. 747 (1982). The "independent investigator" quoted by the government on pedophiles using pornography for arousal (Pet.Br. 39) is in fact an FBI agent. *See United States v. Lamb, supra*, 945 F.Supp. at 450.

B. The CPPA Violates this Court's Well-Established Limits for Punishing Speech on the Theory That it May Encourage Others to Engage in Unlawful Behavior

In the absence of any proof of actual harm, the crux of the government's argument is that it can ban non-obscene images of fictitious minors because they *might* encourage some viewers to engage in unlawful behavior by "whet[ting]" the appetite of potential pedophiles. But that argument is constitutionally indistinguishable from the proposition that hate speech can be banned because it may lead to hate crime. The Court soundly rejected that proposition in *Brandenburg v. Ohio*, 395 U.S. 447 (1969), when it ruled that an audience's possible violent reaction can be imputed to a speaker only if the speaker's words were directed to "inciting or producing imminent lawless action and . . . [were] likely to make or produce such action." *Compare R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), *with Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

The government acknowledges the *Brandenburg* rule (Pet. Br. 31), but argues for an exception that would be a gaping hole in First Amendment protection, swallowing many forms of expression. The government's assertion is that powerful and evocative speech may lead an impressionable listener to engage in illegal or self-destructive behavior. The *Brandenburg* rule, however, does not rest on the "naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas." *See Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (Hustler magazine article on "auto-erotic asphyxiation" that led teenage boy to hang himself while masturbating protected by First Amendment). Even the explicit advocacy

of future illegal action does not warrant suppression by the government. *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

Pictures of juvenile or child sexuality that do not involve real minors cannot be deemed "advocacy" of illegal conduct, much less "incitement." To make the point obvious, images prohibited by the CPPA could not rationally be considered "incitement" if they were presented at a scholarly conference or couched with warnings. Yet the government argues that such images can be criminalized regardless of whether they are possessed by a scientist, journalist, or sex educator, because of the supposed connection between viewing them and the seduction of children. But there is no basis for presuming that sexual images will necessarily or even in many cases "incite" either reluctant minors or potential molesters to engage in illicit sexual acts. The "incitement" cases demand much more convincing evidence than the government has presented here. *See Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) (advertising of contraceptives does not illegally "incite" sexual acts); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959) (film did not "incite" adultery);[18] *American Amusement Machine Ass'n v. Kendrick, supra*, 244 F.3d at 575

[18] In *Kingsley*, the Court invalidated a state law that banned any "immoral" film, defined as a film that portrayed "acts of sexual immorality" as "desirable, acceptable, or proper." New York had denied a license to the film of "Lady Chatterley's Lover" because it portrayed adultery as "right and desirable." The Court reasoned that the state banned the film because it "advocates an idea – that adultery under certain circumstances may be proper behavior. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty." 360 U.S. at 688. *See also, Butler v. Michigan*, 352 U.S. 380, 381 (1957) (reversing conviction under statute that banned a book "tending to the corruption of the morals of youth.").

(violent video games not shown to "incite" juvenile violence).[19]

Judge Easterbrook's opinion in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), is a sound guide to the proper analysis for the instant case. Indianapolis sought to justify its ordinance on the ground that "pornography affects thoughts." 771 F.2d at 328. Judge Easterbrook acknowledged that "people often act in accordance with the images and patterns they find around them." *Id.* at 328-29. The court therefore accepted for purposes of argument the "premises" of the ordinance – that depictions of the subordination of women in fact "tend to perpetuate subordination," including the "bigotry and contempt it produces, with the acts of aggression it fosters . . . " *Id.* at 329. The court reasoned, however, that this "simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation." *Id.* In this sense, pornography is no different from "racial

[19] *Accord, Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997) (trading cards depicting heinous crimes not harmful to minors, rejecting contention that minors "imitate" such crimes); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992) (invalidating statute designed to protect minors against violence on television); *Waller v. Osbourne*, 763 F.Supp. 1144, 1150-51 (M.D. Ga. 1992) (lyrics suggesting that young listeners commit suicide protected by First Amendment); *Watters v. TSR, Inc.*, 715 F.Supp. 819 (W.D. Ky. 1989) ("Dungeons and Dragons" game not legally responsible for causing suicide; protected by First Amendment); *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D. Fla. 1979) (broadcasters of television violence may not be held liable for causing imitative criminal act); *Olivia N. v. NBC*, 126 Cal.App.3d 488 (1981), *cert. denied*, 458 U.S. 1108 (1982) (same; "copycat" criminal act following television program).

bigotry, anti-Semitism, violence on television," expressions of disrespect for government and so on, since people who are exposed to the speech may act on it, with undesirable social consequences. *Id.* at 330. "Much speech is dangerous" (*id.* at 333), but this does not mean that government can outlaw it. Thus, for example, the ugly racist ideas of the Ku Klux Klan may be communicated, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Communists who wish to overturn our government may speak freely, *DeJonge v. Oregon*, 299 U.S. 353 (1937); Nazis may march through a largely Jewish community, *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); and pornography that "subordinates" women cannot be made subject even to civil sanctions. *American Booksellers Ass'n v. Hudnut, supra.*

The government cites only one decision of this Court to support its argument that the CPPA is justified by the need to stop pedophiles, and it stands for precisely the opposite conclusion for which the government cites it. In *Osborne v. Ohio*, the Court expressly rejected the argument that the private possession of even obscene material may be punished on the ground that it "would poison the minds of its viewers." 495 U.S. at 109; *see Stanley v. Georgia*, 394 U.S. 557, 565 (1969). The fact that such material "might lead to deviant sexual behavior" is not sufficient to criminalize its possession. *Osborne*, 495 U.S. at 109 n.4; *Stanley*, 394 U.S. at 566-67. *Osborne* upheld a state statute criminalizing possession of actual child pornography, but reversed the conviction on due process grounds. In dictum cited by the government, the Court noted that encouraging destruction of child pornography is desirable "because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." 495 U.S. at 111. The Court certainly did not hold, or even imply, however, that this "suggestion" was sufficient in and of itself to uphold the constitutionality

of the challenged statute. Rather, it was the state's interest in eliminating the market for *real* child pornography and thereby protecting the children who were abused in its production that justified the departure from the rule in *Stanley v. Georgia*. Thus, in distinguishing the Ohio statute from the one struck down in *Stanley*, the Court stated: "In *Stanley*, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned the obscenity would poison the minds of its viewers. . . . The difference here is obvious: [T]he State does not rely on a paternalistic interest in regulating Osborne's mind. Rather Ohio has enacted [a statute] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." 495 U.S. at 109. Further, the state statute in *Osborne* contained specific exceptions for nude pictures of children for "artistic," "educational," "research" or other valid purposes. 495 U.S. at 106.

The government may of course directly prohibit enticing children into sexual acts, regardless of the enticements used – candy, ice cream, money or erotic pictures. Indeed, sexual acts and attempted acts with minors already are crimes in a variety of contexts. *E.g.*, 18 U.S.C. § 2422(b) (enticing minor to engage in sexual activity); 18 U.S.C. § 2423 (travel with intent to engage in sexual act with juvenile); Cal. Penal Code § 288; *see also* § 311.4(c) (inducing minor to engage in sexual act to make pornography). The government can and should engage in vigorous enforcement of these laws. But in enacting the CPPA, it ignored a practical and less restrictive alternative to the ban of protected speech. Congress rejected the Department of Justice recommendation that instead of criminalizing nonobscene sexual images that do not use actual children, it increase the penalties for *obscene*

images of children, whether real or virtual. Senate Hearing at 32 (testimony of Deputy Assistant Attorney General Di Gregory). In contrast to the CPPA, this solution would ensure protection for legitimate speech and research with serious literary, artistic, scientific, or medical value. Instead, Congress chose to enact a statute that violates the First Amendment.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision of the court of appeals invalidating the provisions of the CPPA at issue in this case because they violate the First Amendment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

THE FREE SPEECH COALITION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief Of Association Of American Publishers, Inc., American Booksellers Foundation For Free Expression, Freedom To Read Foundation, International Periodical Distributors Association, Magazine Publishers Of America, Publishers Marketing Association, And Video Software Dealers Association As *Amici Curiae* In Support of Respondents

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TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Introduction and Interest of the *Amici* 1

Summary of Argument 4

Argument 6

I. The CPPA Is An Unconstitutional Ban On Protected Speech 6

A. The Court of Appeals Properly Applied Strict Scrutiny 6

B. The CPPA Does Not Serve a Compelling Government Interest 7

1. The CPPA exceeds the limits this Court has placed on the definition of child pornography 7

2. The government has no compelling interest in banning imaginative works on the ground that they may have harmful effects 12

3. Facilitating enforcement of existing child pornography laws is not a compelling government interest .. 17

Contents

	Page
C. If Upheld, the CPPA Could Lead to More Governmental Regulation of Protected Speech on the Basis of Its Perceived Harmful Effects	18
II. The CPPA Is Overbroad	21
III. The CPPA Is Impermissibly Vague	25
IV. The CPPA's Affirmative Defense Does Not Render It Constitutional	28
Conclusion	30
Appendix A — The *Amici*	1a

TABLE OF CITED AUTHORITIES

	Page
Federal Cases:	
American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001)	19
American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)	14, 16
Baggett v. Bullitt, 377 U.S. 360 (1964)	26
Brandenburg v. Ohio, 395 U.S. 444 (1969)	15
Camfield v. Oklahoma City, 248 F.3d 1214 (10th Cir. 2001)	23
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	16
Eclipse Enterprises, Inc. v. Gulotta, 134 F.3d 63 (2d Cir. 1997)	19
Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999)	*passim*
Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)	16, 17
Hess v. Indiana, 414 U.S. 105 (1973)	15
Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684 (1959)	21

Cited Authorities

Page

Kolender v. Lawson, 461 U.S. 352 (1983) 25, 26

Miller v. California, 413 U.S. 15 (1973) 7

New York v. Ferber, 458 U.S. 747 (1982) ..... *passim*

Oklahoma v. Blockbuster Videos, Inc., No. Civ. 97-1281-T, 1998 WL 1108158, 27 Media L. Rep. 1248 (W.D. Okla. Oct. 20, 1998) 23, 24

Osborne v. Ohio, 495 U.S. 103 (1990) 11, 13

R.A.V. v. St. Paul, 505 U.S. 377 (1992) 6, 15

Regina v. Hicklin, L.R. 3 Q.B. 360 (1868) 15

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) ..... *passim*

Roth v. United States, 354 U.S. 476 (1957) 3, 15

Smith v. California, 361 U.S. 147 (1959) 18, 26

Smith v. Goguen, 415 U.S. 566 (1974) 25

Speiser v. Randall, 357 U.S. 513 (1968) 26

Stanley v. Georgia, 394 U.S. 557 (1969) ..... *passim*

Texas v. Johnson, 491 U.S. 397 (1989) 15

Cited Authorities

Page

United States v. Hilton, 167 F.3d 61 (1st Cir.), *cert. denied*, 528 U.S. 844 (1999) 21

United States v. Knox, 32 F.3d 733 (3d Cir. 1994) 22

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 3, 6, 7, 15

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 28, 29

Video Software Dealers Ass'n v. Oklahoma City, 6 F. Supp. 2d 1292 (W.D. Okla. 1997) 23

Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992) 19

Whitney v. California, 274 U.S. 357 (1927) 21

State Cases:

McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Cal. App. 1988) 16

United States Constitution:

First Amendment ..... *passim*

Federal Statutes:

18 U.S.C. § 2252A(b) 27

18 U.S.C. § 2252A(c) 9, 28

Cited Authorities

	Page
18 U.S.C. § 2256(2)(A)	23
18 U.S.C. § 2256(8)(B)	9
18 U.S.C. § 2256(8)(D)	9
Legislative Materials:	
H.R. 1005, 107th Cong. (2001)	19
H.R. 2036, 106th Cong. (1999)	19
S. 792, 107th Cong. (2001)	19
S. Rep. No. 104-358 (1996)	9, 10, 17
Miscellaneous:	
Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 339 (Summer 1997)	14, 16, 20
Clay Calvert, *The 'Enticing Images' Doctrine: An Emerging Principle in First Amendment Jurisprudence?*, 10 FORDHAM I.P., MEDIA & ENT. L.J. 595 (2000)	14, 18
"Fallout from Child Pornography Act: 'Kiddie porn' Law Has Apparently Scared Off Potential Distributors," San Francisco Chronicle, Aug. 3, 1997	22

INTRODUCTION AND INTEREST OF THE *AMICI*

The Association of American Publishers, Inc., American Booksellers Foundation for Free Expression, Freedom to Read Foundation, International Periodical Distributors Association, Magazine Publishers of America, Publishers Marketing Association, and Video Software Dealers Association (hereinafter, "*amici*") submit this brief *amici curiae* in support of respondents.[1]

Amici and their members publish, produce, distribute, sell, and loan books, magazines, videos, works of art, and printed materials of all types, including works that are scholarly, literary, artistic, scientific, and entertaining.[2] They are essential intermediaries between the creators and the consumers of artistic and literary materials. *Amici* publish, distribute, and sell mainstream materials that may include photographs or depictions of young adults engaged in sexual conduct, the creation of which could be chilled by, or become the subject of prosecution under, the Child Pornography Prevention Act of 1996 ("CPPA" or the "Act"). In addition, *amici* publish, distribute, and sell a wide range of what some may consider provocative, controversial *non-sexual* material that also may be vulnerable to regulation if the CPPA is upheld. *Amici* therefore have a significant interest in the resolution of this case.

---

1. Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no persons or entities other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(3)(a), *amici* have obtained the written consent of the parties to the filing of this brief. Those consents have been lodged with the clerk.

2. A description of the *amici* is attached as Appendix A.

Amici are committed to the principle that defending controversial, distasteful, and even potentially dangerous speech is necessary to vindicate First Amendment protection for the diverse products of the human imagination. This case involves an attempt by the federal government to ban products of the human imagination. Prior to the CPPA, child pornography was defined and generally understood to consist of images created with the participation of children; it was deemed unprotected by the First Amendment in order to prevent the exploitation of these children. *See New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, indeed, the Court specifically approved and virtually recommended the use of simulation or young-looking adults in order to avoid the abuse of minors used to create sexually-explicit material. 458 U.S. at 763, 765.

In passing the CPPA, Congress disregarded *Ferber* and expanded the definition of child pornography to include "virtual" child pornography — images generated by computer without the use of minors — and any other images that "appear[] to be" minors engaging in sexual activity. Congress justified this dramatic broadening of the scope of the child pornography law on the ground that images that merely "appear[] to be" minors can have harmful consequences for minors. However, as the court of appeals observed, in criminalizing "[i]mages that are, or can be, entirely the product of the mind," *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1092 (9th Cir. 1999), Congress entered the realm of impermissible content-based censorship and banned a substantial amount of speech that is constitutionally protected because it is not obscene and does not involve the use of actual children.

Amici are as outraged over the sexual exploitation of children as the members of Congress who drafted the CPPA. But antipathy to child pornography and abhorrence of predatory pedophiles must not obscure the significant First Amendment principles implicated in this case. As this Court recently observed, "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000).

The CPPA exceeds the limitations that the First Amendment places on government efforts to combat social problems by suppressing speech. Once the link to the abuse of actual children used in the creation of the material is broken — as it is with "virtual" child pornography or material that depicts young-looking adults — the remaining asserted state interests involve seeking to control the *effects* or *uses of* images that were otherwise lawfully created. The court of appeals correctly found that these bases for prohibiting speech are antithetical to fundamental First Amendment principles.

The regulation of otherwise protected speech on the ground that it *may stimulate improper thoughts or be used as an instrument of crime in the hands of deviant persons* is a dangerous incursion on the First Amendment, an invitation to censorship, and a return to an approach discarded as unconstitutional by the Court years ago. *See Roth v. United States*, 354 U.S. 476 (1957). Attempting to control evil conduct by banning evil thoughts is fundamentally antithetical to this country's conception of free speech. As this Court recognized in *Stanley v. Georgia*, 394 U.S. 557, 565 (1969), "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Outside a few strictly limited categories,

which are not at issue here, regulating speech based on the impact on the listener or viewer "turn[s] First Amendment jurisprudence on its head." *Free Speech Coalition*, 198 F.3d at 1095.

Amici fear that the broad and subjective language in the CPPA will chill a substantial amount of constitutionally protected expression. The ban on non-obscene depictions of what "appears to be" or is "advertised, promoted, presented, described, or distributed" in a manner that "conveys the impression" of being a minor engaged in sexual conduct gives authorities the power to police a wide-range of artistic, educational, scholarly or entertaining images, and thus will have a chilling effect on the mainstream media that *amici* and their members represent. Any harm that may be inflicted on minors by pedophiles with the assistance of materials that *appear* to depict minors engaged in sexual activity must be combated by punishing pedophiles, not by potentially depriving the public of mainstream works.

In light of these concerns, and for the reasons set forth herein, *amici* urge the Court to affirm the decision of the court of appeals.

SUMMARY OF ARGUMENT

Children are among the most precious and vulnerable members of our society, and the goal of protecting minors from sexual abuse is critically important. That goal must be achieved, however, without trampling upon well-established First Amendment principles.

The CPPA violates the First Amendment in several respects:

1. It is a content-based speech restriction that fails strict scrutiny because it bans speech on the basis of the effect that speech purportedly has on certain particularly susceptible listeners or the use to which it is put by one deviant class, a rationale for censorship that is not countenanced by our First Amendment jurisprudence and that, if upheld, would set a dangerous precedent for regulating heretofore protected speech.

2. It is overbroad, as it can be interpreted to apply to a substantial amount of mainstream, constitutionally protected artistic expression.

3. It is impermissibly vague, as the subjectivity of the terms "appears to be" and "conveys the impression" invest authorities with excessive discretion to prosecute citizens for possession or distribution of a wide-range of otherwise protected expression.

4. Its affirmative defense improperly shifts the burden of disproving an element of a criminal offense to the defendant and fails to cure the Act's constitutional defects.

ARGUMENT

I. THE CPPA IS AN UNCONSTITUTIONAL BAN ON PROTECTED SPEECH

A. The Court of Appeals Properly Applied Strict Scrutiny

The Court of Appeals correctly found that the CPPA is a content-based speech restriction. *See Free Speech Coalition*, 198 F.3d at 1090-91. As such, it is presumptively unconstitutional and may only be upheld if it survives strict scrutiny. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). The CPPA is content-based because the "appears to be" and "conveys the impression" provisions distinguish protected from unprotected speech based on its content — specifically, the impression the content makes on the viewer. *See Playboy*, 529 U.S. at 811-13 (law that "focuses only on the content of the speech and the direct impact that speech has on its listeners . . . is the essence of content-based regulation"); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997) ("The purpose of the CDA is to protect children from the primary effects of 'indecent' and 'patently offensive' speech. . . . Thus, the CDA is a content-based blanket restriction on speech.").

The government's contention that strict scrutiny does not apply to the CPPA notwithstanding the fact that it is content-based because it prohibits unprotected speech (Pet. Br. at 26) places the cart before the horse.[3] As discussed

3. The government no longer presses the erroneous argument that the CPPA is content-neutral. *See Free Speech Coalition*, 198 F.3d at 1091.

above and further below, *Ferber* held the child pornography at issue there to be unprotected because the government has a compelling interest in preventing the sexual abuse of minors that are used in the creation of such material. The government admits, however, that the "virtual" child pornography at issue here is *not* child pornography as defined in *Ferber*. *See* Pet. Br. at 21. Rather, the CPPA represents an attempt to create an entirely new category of unprotected speech. Accordingly, the government must satisfy strict scrutiny by demonstrating that the CPPA is narrowly tailored to serve a compelling state interest. *See Playboy*, 529 U.S. at 813. As shown below, the CPPA fails strict scrutiny because it does not further a compelling government interest *and* is not narrowly tailored to avoid suppressing protected speech.

B. The CPPA Does Not Serve a Compelling Government Interest

1. The CPPA exceeds the limits this Court has placed on the definition of child pornography

Prior to *Ferber*, the only sexually oriented material that was not protected by the First Amendment was material that was obscene under the three-part test set forth in *Miller v. California*, 413 U.S. 15 (1973). In *Ferber*, the Court held that child pornography is unprotected speech even if it does not qualify as obscenity under the *Miller* test.[4] However, *Ferber* expressly limited the definition of child pornography to material created using actual children. *See Ferber*, 458

4. In rejecting application of the *Miller* standard to child pornography, the Court observed that the *Miller* factors "bear no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." *Ferber*, 458 U.S. at 761.

U.S. at 764 ("When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production . . . it is permissible to consider these materials as without the protection of the First Amendment.").

The Court in *Ferber* cited five reasons for its finding that child pornography is not protected speech, all of which concerned the well-documented harm to children used in the production of sexually explicit work. 458 U.S. at 756-64. Making clear that the state's compelling interest did not go beyond protecting children who participated in the creation of the material, the Court stated:

> We note that the distribution of descriptions or other depictions of sexual conduct [involving minors], not otherwise obscene, *which do not involve live performance or photographic or other visual reproduction of live performance*s, retains First Amendment protection.

458 U.S. at 764-65 (emphasis added). Reinforcing the idea that material can qualify as child pornography only if it depicts actual minors, the Court noted:

> [I]f it were necessary for literary or artistic value, *a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. . . .*

Id. at 763 (emphasis added). Thus, *Ferber* clearly endorsed using adults who appear to be underage as well as using simulations of minors in non-obscene sexually-explicit works.

The CPPA prohibits works of the type expressly approved in *Ferber*. It bans "any visual depiction" that "is, *or appears to be*, of a minor engaging in sexually explicit conduct" or that is "advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. §§ 2256(8)(B), (D) (emphasis added). Thus, the CPPA contravenes *Ferber* by (1) prohibiting the use of young-looking adults who appear to be minors unless the creator or purveyor of the material can demonstrate that it did not intend for the adult to be viewed as a minor; and (2) prohibiting the use of computer-simulated or other realistic-looking depictions of children in sexually explicit films, paintings, drawings, or sculptures with serious literary, artistic, political, or scientific value. *See* 18 U.S.C. § 2252A(c).

Congress's primary avowed purpose in enacting the CPPA was to combat the creation, possession, and dissemination of so-called "virtual" child pornography, *i.e.*, images of minors engaged in sexually explicit conduct that are made through computer imaging techniques and do not involve the use of actual children. *See* S. Rep. No. 104-358, at 7 (1996). Specifically, the CPPA is predicated on findings that simulated child pornography, like real child pornography, "stimulates the sexual appetites" of pedophiles and is used by pedophiles to persuade children to engage in sexual conduct. *See* S. Rep. No. 104-358, at 12-14; Pet. Br. at 4-5. The government contends that it has a compelling interest in banning virtual child pornography because the images affect viewers in a manner that poses a danger to minors and to society. In addition, the government contends that virtual child pornography hinders the prosecution of child pornography defendants by making it impossible for

prosecutors to prove that pornographic materials depict actual children and that it fuels the market for traditional child pornography. *See* S. Rep. No. 104-358, at 16-17; Pet. Br. at 6.

These rationales for banning the production, distribution, possession, and viewing of virtual child pornography do not constitute compelling government interests under *Ferber*. In *Ferber*, as noted, the Court held that the government may constitutionally prohibit the production and distribution of child pornography to prevent physical and psychological harm to the actual children who are its subjects. 458 U.S. at 756-64. In the CPPA, by contrast, Congress targeted speech that, unlike traditional child pornography, is not inherently harmful because of how it is made, but, rather, *is believed to have an undesirable effect on pedophiles*. This attempt to ban speech based on how it may affect certain recipients who then may use it for improper purposes runs afoul of core First Amendment principles. If accepted, it would pave the way for regulation of many kinds of heretofore protected speech that are posited to have an undesirable effect on certain vulnerable readers or listeners, as discussed further below.

The government contends that *Ferber* does not preclude banning computer-generated child pornography because the computer technology used to create such images did not exist when *Ferber* was decided and therefore was not contemplated by the Court in that case. Pet. Br. at 27. This argument has no force in light of the fact that the Court in *Ferber* expressly contemplated the use of alternatives to actual children engaging in sexual conduct, such as youthful-looking adults or simulations, as constitutionally permissible methods of creating non-obscene sexually explicit material.

The fact that computer morphing was not specifically before the Court in *Ferber*, and may not have been perceived as a problem at the time, does not invalidate the Court's view that imagery created without using actual children would not cause the harms that the Court found warranted denying First Amendment protection to child pornography notwithstanding any literary, artistic, political or scientific value that it might possess.

The government also contends that in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court expanded the permissible bases for regulating child pornography beyond those approved in *Ferber*. Pet. Br. at 31. The government points to the Court's statement in *Osborne* that "encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." *Osborne*, 495 U.S. at 111. The government argues, as did the dissent in the court of appeals, that this rationale applies equally to "virtual" child pornography. *See* Pet. Br. at 31; *Free Speech Coalition*, 198 F.3d at 1099 (Ferguson, J., dissenting). As the court of appeals pointed out, however, *Osborne*, like *Ferber*, was concerned with halting "the use of children as subjects of pornographic materials." 495 U.S. at 109; *Free Speech Coalition*, 198 F.3d at 1094 n.7. Just as "[n]othing in *Ferber* can be said to justify the regulation of [child pornography] other than the protection of the actual children used in the production of the materials," *Free Speech Coalition*, 198 F.3d at 1092, nothing in *Osborne* suggests that the Court would have found that preventing pedophiles from using material not created using actual minors would rise to the level of a compelling state interest.

2. The government has no compelling interest in banning imaginative works on the ground that they may have harmful effects

The court of appeals understood that in seeking to ban creative images that look like real child pornography, Congress overstepped the bounds of the First Amendment.

> Because the [CPPA] attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment . . . . To accept the secondary effects argument as the gauge against which the statute must be measured requires a remarkable shift in the First Amendment paradigm. Such a transformation, how speech impacts the listener or reviewer, would turn First Amendment jurisprudence on its head.

Free Speech Coalition, 198 F.3d at 1094-95. The First Amendment paradigm to which the court of appeals alluded is that speech cannot be regulated in order to eradicate thoughts or ideas, however offensive or repugnant they may be, except in the extremely limited circumstances discussed below. Thus, "any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions" because "to hold otherwise enables the criminalization of foul fragments of creative technology that do not involve any human victim in their creation or in their presentation." *Id.* at 1093.

Because the compelling state interest identified in *Ferber* and *Osborne* in prohibiting even the possession of speech that is *inherently* harmful to the children exploited in its creation is absent in this case, the concerns raised by the Court in *Stanley* regarding the regulation of evil thoughts are equally valid here. In *Stanley*, where the Court struck down a statute that prohibited the private possession of obscene material, the Court stated: "Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts." 394 U.S. at 565. That objective, the Court held, "is wholly inconsistent with the philosophy of the First Amendment." *Id.* at 566. The fact that the CPPA was designed to combat not just the possession of child pornography but also the activities of child molesters and pedophiles does not lessen the concern that Congress has criminalized artistic creations based on the fear of how a certain class of susceptible viewers will react to them. This is tantamount to the government attempting to "control the moral content of a person's thoughts." *Id.* at 565.

The legitimacy of Congress's goals in passing the CPPA does not validate the means Congress has chosen to pursue those goals. Congress has banned a form of speech that is in itself purely the product of a person's mind in order to forestall repugnant thoughts that may be acted upon. The Court addressed an analogous rationale in *Stanley*, where it held that

> the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit

> possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

394 U.S. at 567.

The court of appeals correctly held that the government's interest in engaging in such thought control is not compelling. *See Free Speech Coalition*, 198 F.3d at 1094-95; *id.* at 1092 ("the articulated compelling state interest cannot justify the criminal prescription when no actual children are involved in the illicit images either by production or depiction"). *See also* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 339, 460 (Summer 1997) ("Virtual child pornography, which is not obscene, is nothing more than an imaginative idea. However repulsive, however disgusting to majoritarian beliefs, ideas constitute protected speech."). Banning otherwise protected speech based on its putative effects is anathema to the First Amendment because it "has the potential to mask the regulation of speech simply because the ideas or images it conveys are offensive." Clay Calvert, *The 'Enticing Images' Doctrine: An Emerging Principle in First Amendment Jurisprudence?*, 10 FORDHAM I.P., MEDIA & ENT. L.J. 595, 606 (2000).

The Seventh Circuit, in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), well encapsulated the threat to freedom of speech posed by laws like the CPPA that attempt to control the thoughts of readers or listeners: "[A]lmost all cultural stimuli provoke unconscious responses . . . If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech." 771 F.2d at 330.

Attempting to regulate speech based on its effect espouses the long-rejected 1868 holding of *Regina v. Hicklin*, L.R. 3 Q.B. 368 (1868). *Hicklin* set forth the early leading standard of obscenity, which allowed material to be judged based on the effect of isolated excerpts upon particularly susceptible persons. In *Roth v. United States*, 354 U.S. 476, 489 (1957), the Court expressly rejected the *Hicklin* test on the ground that because it "might well encompass material legitimately treating with sex . . . it must be rejected as unconstitutionally restrictive of the freedoms of speech and press."

None of the traditional categories of unprotected speech embraces the creative works proscribed by the CPPA. *See R.A.V.*, 505 U.S. at 382-83 (content-based restrictions permitted in a "few limited areas" such as obscenity, defamation, and fighting words). Of particular relevance here, this Court has repeatedly held that, unless speech *incites immediate and direct harm*, it is not subject to government regulation simply because it is has undesirable effects on the thoughts of listeners, or because it has the effect of offending others in the community. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (advocacy of violence protected by First Amendment except where directed to inciting or producing imminent lawless action and likely to incite or produce such action); *Playboy*, 529 U.S. at 813 ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists."); *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (ban on flag burning not permitted based on its "potential for a breach of the peace"); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (provocative remarks by a demonstrator to police could not be punished on the ground

that they had a mere tendency to lead to violence); *Stanley*, 394 U.S. at 565 (government's concern with the effect of obscenity on the minds of viewers not a permissible reason for banning private possession of obscenity); *Hudnut*, 771 F.2d at 333 (claim that pornography causes men to view women as objects and discriminate against women cannot justify prohibition on pornography that portrayed women in degrading manner); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987) (magazine's detailed description of autoerotic asphyxia, which teenager followed in making fatal attempt to perform the act, protected by First Amendment because it did not "incite" the teenager to harm himself); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Cal. App. 1988) (dismissing on First Amendment grounds claim that record "Suicide Solution" intentionally incited suicide of listener).[5]

There can be no doubt that virtual child pornography "is neither sufficiently imminent nor impelling to constitute incitement." Burke, *The Criminalization of Virtual Child Pornography*, *supra*, at 461. Indeed, it is inconceivable that mere images, as opposed to spoken words, could ever constitute incitement. That is because, as the court of appeals noted, "the unhappy effects of pornography depend on mental intermediation." *Free Speech Coalition*, 198 F.3d at 1093. This intermediation, however deviant it may be, removes virtual child pornography from the realm of speech that may be banned consonant with core values embedded in our First Amendment jurisprudence.

5. Denying First Amendment protection to so-called "fighting words" is likewise premised on the immediate harm caused by their utterance. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (First Amendment does not protect "fighting words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

Those values were well articulated in *Herceg*, where the court expressed our constitutional commitment to protecting even harmful speech in the interest of permitting freedom of thought to flourish:

> The constitutional protection accorded to the freedom of speech and of the press is not based on the naïve belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.

814 F.2d at 1019.

Because the CPPA cannot be reconciled with these fundamental First Amendment principles, the court of appeals properly struck it down.

3. Facilitating enforcement of existing child pornography laws is not a compelling government interest

The government also claims that "because computers can produce images that are virtually indistinguishable from images of real children, a defendant charged with distributing or possessing images of real children could almost always argue that the government failed to prove beyond a reasonable doubt that the images were of real children." Pet. Br. at 23; S. Rep. No. 104-358, at 20. The government has offered only a few examples of defendants raising such a defense, and none of them was acquitted. *See* Pet. Br. at 37 n.8; S. Rep. No. 104-358, at 17. This evidence falls far short of demonstrating a compelling interest in regulating protected speech.

Moreover, a prohibition of protected speech may not be justified on the ground that the prohibition "eases the administration of otherwise valid criminal laws." *Stanley*, 394 U.S. at 568 (citing *Smith v. California*, 361 U.S. 147 (1959)). The First Amendment does not permit the creation of a new category of unprotected speech in order to ease the task of law enforcement authorities in policing a category of speech already found to be unprotected.

C. If Upheld, the CPPA Could Lead to More Governmental Regulation of Protected Speech on the Basis of Its Perceived Harmful Effects

The potential implications of endorsing the government's justifications for the CPPA are far-reaching and extremely troublesome. If non-obscene sexually explicit images, the creation of which did not involve actual children, can be banned based on their purported effect on certain viewers, then the government could, in theory, regulate any category of speech that could be asserted to have some undesirable effect on certain recipients. As one commentator noted:

> If one class of speech can be said to somehow entice children into illegal conduct, then surely Congress will continue to expand the definition of child pornography, sweeping up and regulating more and more forms of previously protected speech that allegedly influence children.

Calvert, *The 'Enticing Images' Doctrine*, *supra*, at 607.

Beyond the context of child pornography, we have already begun to see legislative efforts to eradicate speech

instance, studies purporting to find that depictions of violence may cause young viewers to react aggressively or violently are increasingly being cited to justify restrictions on violent imagery, musical lyrics, and even written descriptions. Indeed, a measure was introduced into the House of Representatives in June 1999 that would have made it a crime to expose children to images, sound recordings, or printed descriptions of graphic violence. *See* H.R. 2036, 106th Cong. (1999). Measures presently pending before Congress seek to ban the broadcasting of certain violent video programming during hours that children are likely to be in the viewing audience based on Congress' belief that "violent video programming influences children, as does indecent programming." *See, e.g.*, H.R. 1005, 107th Cong. (2001). Yet another bill would make marketing "adult-rated" movies, video games, and music to minors illegal as a "deceptive" trade practice. The bill is based on lawmakers' assertion that "media violence can be harmful to children." *See* S. 792, 107th Cong. (2001).

In addition to these Congressional attempts to impose unprecedented regulations on speech, a number of laws have been passed at the state and local level attempting to regulate violent imagery in the interest of protecting minors. *See, e.g.*, *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (preliminarily enjoining enforcement of Indianapolis ordinance barring access of minors unaccompanied by parent to video game machines containing "graphic violence" and deemed to be harmful to minors); *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63, 64 (2d Cir. 1997) (finding unconstitutional local ordinance barring distribution to minors of trading cards depicting heinous crimes or criminals that legislators considered a contributing factor to juvenile crime); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992) (striking down state statute banning rental or sale of violent video cassettes to minors).

These legislative efforts, which are predicated on the theory that the rationale for regulating sexual material applies equally to violent material, highlight the enormous potential ramifications of this case for mainstream speech that is vulnerable to claims that it leads some to engage in aberrant behavior. *Amici* believe that these efforts, however well-intentioned, are ill-advised not only because they lack factual support but, more importantly, because they cannot be reconciled with the free marketplace of ideas guaranteed by the First Amendment.

* * *

New concerns associated with the advent of new technologies cannot serve as justification for whittling away at fundamental freedoms of speech. *See generally ACLU*, 521 U.S. 844 (striking down statute prohibiting transmission of "indecent" or "patently offensive" communications to minors over the Internet). "As technology presents greater challenges to the preservation of fundamental freedoms, opening the door to the punishment of virtual crimes, based upon a fear that actual crimes will occur, or that society as a whole will degenerate, is frightful." Burke, *The Criminalization of Virtual Child Pornography*, *supra*, at 468.

State and federal governments have an array of laws in their arsenals to fight the sexual abuse of children, including existing child pornography laws and statutes that criminalize sexual contact with children. Seduction or molestation of children should be vigorously prosecuted, but not by means of a statute that imposes an outright ban on artistic works that may be used by perpetrators of the crime. "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not

abridgment of the rights of free speech." *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684, 689 (1959) (citing *Whitney v. California*, 274 U.S. 357, 376 (1927)).

II. THE CPPA IS OVERBROAD

The court of appeals also found the CPPA unconstitutionally overbroad because, on its face, it prohibits non-obscene sexual material that does not involve actual children and therefore is protected by the First Amendment. *Free Speech Coalition*, 198 F.3d at 1096. Because, as discussed above, the government has no compelling interest in banning images that were not created with and that do not depict actual children, the court of appeals' finding of overbreadth should be sustained.

The CPPA would forbid the distribution of material with "serious literary, scientific, or educational value or material which does not threaten the harms sought to be combated by the State." *Ferber*, 458 U.S. at 766. Unlike *Ferber*, where the Court held that the use of minors in sexually explicit educational, medical or artistic works would amount to "no more than a tiny fraction of the materials within the statute's reach," 458 U.S. at 773, the sweeping language of the CPPA, which criminalizes any visual depiction that "appears to be" of a minor engaged in sexually-explicit conduct, or that is advertised or promoted to "convey the impression" that a minor is engaged in sexual conduct, would apply to a wide range of creative, artistic, and educational visual depictions. The statute's reach is not limited to a few works existing at the "edges" of the statute that can be accommodated through case-by-case evaluation. *See United States v. Hilton*, 167 F.3d 61, 74 (1st Cir.), *cert. denied*, 528 U.S. 844 (1999) (upholding CPPA).

The amount of mainstream speech that is potentially subject to prosecution under, and therefore will be chilled by, the CPPA is substantial.[6] One example of the chilling effect of the CPPA on mainstream works of art occurred in 1997, when U.S. film distributors became reluctant to release *Lolita*, the second film version of Vladimir Nabokov's classic novel. The film's more explicit sexual scenes involving the title character were played by an adult-body double, but distributors apparently feared prosecution under the CPPA because those scenes "appear[ed] to be" of a minor engaged in sexual conduct and, by the very nature of *Lolita's* storyline, were presented to "convey the impression" that a minor was engaging in sex. *See* "Fallout from Child Pornography Act: 'Kiddie porn' Law Has Apparently Scared Off Potential Distributors," San Francisco Chronicle, Aug. 3, 1997, at 4/Z5.

The CPPA also arguably covers the recent critically acclaimed film *Traffic*, for which Steven Soderbergh won the Academy Award for best director. *Traffic* contains a scene, intended to illustrate the dangers to teenagers of drug addiction, in which a 16 year-old girl (played by a 17 year-old actress) is shown in bed from the shoulders up in a manner that makes clear that she is having intercourse. This depiction, while unquestionably having serious artistic value, could be considered subject to the strictures of the CPPA notwithstanding the fact that it does not actually show

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6. The risk to *amici* is particularly great in light of the fact that the CPPA's definition of potential works constituting child pornography does not require that the work be taken as a whole and includes "lascivious exhibition of the genitals" which, under *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994), includes depictions in which there is no nudity and the genitalia are clothed.

sexual conduct because it "appears to be of a minor engaging in sexually explicit conduct" which is defined as "actual or simulated . . . sexual intercourse." 18 U.S.C. § 2256(2)(A).

In attempting to convince the Court that, despite the plain language of the statute, the CPPA does not reach works of significant value, the government contends that "[t]o the extent that it might be necessary for literary, scientific, or educational purposes to depict children engaging in such conduct, the depictions can be created in a manner that is consistent with the CPPA." Pet. Br. at 24-25. Thus, the government argues, the use of "drawings, cartoons, sculptures, or paintings that depict youthful-looking persons in sexual poses" are not prohibited. *Id.* at 25. The government also claims that the CPPA "is aimed at hard core child pornography" and does not apply to "visual materials in which sexually explicit conduct by children is understood to be taking place, as long as the sexually explicit conduct is not itself visually depicted." *Id.* at 17, 25.

However, that Congress may have *intended* to criminalize only computer-generated images that are "virtually indistinguishable" from traditional child pornography provides no comfort to those whose artistic creations nevertheless arguably fall within the CPPA's broad language. The confiscation of copies of the Academy Award-winning motion picture *The Tin Drum* by the Oklahoma City Police Department in June 1997 pursuant to an *ex parte* ruling that the film contained child pornography in violation of Oklahoma law vividly illustrates the dangers of a speech restriction as broadly worded as the CPPA. *See Camfield v. Oklahoma City*, 248 F.3d 1214 (10th Cir. 2001); *Video Software Dealers Ass'n v. Oklahoma City*, 6 F. Supp. 2d 1292 (W.D. Okla. 1997); *Oklahoma v. Blockbuster Videos, Inc.*, No. Civ. 97-1281-T, 1998 WL 1108158, 27 Media L. Rep. 1248 (W.D. Okla. Oct. 20, 1998).

It is notable that *The Tin Drum* was confiscated as child pornography despite the absence of any display of the genital area in any of the three brief scenes in question *and* despite a statutory exception for "bona fide objects of art or artistic pursuits" (an exception absent from the CPPA). *Blockbuster Videos*, 1998 WL 1108158, at *3. The *Tin Drum* episode underscores the extent to which the government's assurance that only "hard core" virtual child pornography will be prosecuted under the CPPA is insufficient to protect the First Amendment interests of the creators and distributors of mainstream works that contain even non-explicit sexual content involving minors or actors portraying minors.

The Court should not uphold the Act based on a limiting construction that is at odds with the plain language of the statute. Like the statute struck down in *ACLU*, "[t]he open-ended character of the [CPPA] provides no guidance what[so]ever for limiting its coverage." 521 U.S. 884. The Court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Id.* In *ACLU*, the Court reiterated its belief that

> [i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

Id. at 884 n.49.

Even more problematic is the implication of the government's argument that artistic or socially valuable

portrayals of minors engaged in sex must not be realistic in order to avoid prosecution under the statute. For the government to approve certain pictorial forms while criminalizing others amounts to impermissible censorship and governmental meddling in the artistic process.

Because a vast amount of protected speech arguably falls within the CPPA's reach, it is unconstitutionally overbroad.

III. THE CPPA IS IMPERMISSIBLY VAGUE

The pre-CPPA definition of child pornography was not unconstitutionally vague because it incorporated the objective requirement that actual children be photographed or depicted. The same cannot be said of the CPPA. The operative "appears to be" and "conveys the impression" language of the CPPA renders the statute void for vagueness because it fails to adequately constrain the discretion of police and prosecutors to criminalize works that they may subjectively find distasteful or offensive.

A statute is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The primary purpose of the vagueness doctrine is to ensure that legislatures establish guidelines to govern law enforcement so that a criminal statute does not "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Id.* at 358 (citing *Smith v. Goguen*, 415 U.S. 566, 574-575 (1974)).

Where a statute imposes criminal penalties, "the standard of certainty is higher" than it is for civil statutes. *Kolender*, 461 U.S. at 358 n.8. That is so because the concern that "uncertain meanings" inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked," *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)), is particularly acute where the cost of guessing wrong could be a severe criminal penalty. *See ACLU*, 521 U.S. at 872 ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."). Vagueness concerns are also heightened in the context of restrictions on speech. *See Smith v. California*, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.").

These concerns are fully implicated here. As the court of appeals found, the "appears to be" and "conveys the impression" standards are largely subjective, relating to the reaction of any single viewer rather than to any concept or character inherent in the depiction itself. *See Free Speech Coalition*, 198 F.3d at 1095; *ACLU*, 521 U.S. at 873-74 (statute prohibiting "patently offensive" or "indecent" communications to minors on the Internet unconstitutionally vague where it provided no limitations on what could be considered offensive or indecent).[7] As a result, the Act does

7. *See also Kolender*, 461 U.S. at 358 (statute's requirement that loitering individuals provide "credible and reliable" identification was unconstitutionally vague because it "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute").

not provide a person with sufficient guidance in determining whether the material he or she may be dealing with falls within the statute's ambit. The difficulty of distinguishing a person just under the age of minority from a young adult based solely on his or her appearance underscores the problem of hinging criminal liability on such an uncertain distinction. And the severity of the criminal penalties that can be imposed for speech found to violate the CPPA increases the fear of chilling protected speech. *See* 18 U.S.C. § 2252A(b) (providing maximum penalty of thirty years imprisonment for violation of CPPA).

Contrary to the government's claim (Pet. Br. at 27-28), it is impossible to determine objectively what material is criminalized by the CPPA because what "appears to be" a minor to one person may not seem so to another. As such, the CPPA "presents a greater threat of censoring speech that, in fact, falls outside the statute's scope." *ACLU*, 521 U.S. at 874. It is conceivable that a person may be criminally charged if it happens to appear to an official vested with the power to enforce the CPPA that sexually explicit material depicts a minor or is being marketed in a manner that "conveys [that] impression." For a publisher, video store, or newsstand owner, the opprobrium of being labeled a "child pornographer" based on the subjective beliefs of law enforcement officials poses a threat that will lead to self-censorship. The First Amendment does not tolerate such imprecision.

IV. THE CPPA'S AFFIRMATIVE DEFENSE DOES NOT RENDER IT CONSTITUTIONAL

The government also relies on the CPPA's affirmative defense in arguing that the statute is constitutional. *See, e.g.*, Pet. Br. at 25. The defense is available to defendants who can establish that the alleged child pornography was produced using an actual person who was an adult at the time the material was produced, and that the defendant did not advertise, promote, present, describe, or distribute the material in a manner that conveys the impression that it contains a depiction of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2252A(c).

Contrary to the government's argument, the CPPA's affirmative defense would provide little or no relief to the creators and distributors of artistic works. First, due to the requirement that the defendant prove that an "actual" person was used in the material, the defense would not apply to any illustrations, paintings, cartoons, or computer-generated works. .

Second, the affirmative defense would not apply to works, such as a motion picture version of *Lolita*, that are created using an adult portraying a minor with the intention that the adult actually look like a minor engaged in sexual conduct or sexual poses. (As previously noted, the CPPA's prohibition on the use of adults to portray minors in artistic works runs afoul of the Court's acknowledgement in *Ferber* that such depictions could not be constitutionally banned.)

Third, under *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), a librarian, retailer, or distributor is not liable under child pornography statutes unless he or she knew

that the material loaned, sold or distributed contained sexually explicit depictions of an actual minor. Under *X-Citement*, the burden is on the government to prove such knowledge. The CPPA's affirmative defense impermissibly shifts this burden to the defendant to prove instead that the depiction is of an actual adult.

Finally, for mainstream businesses, such as those represented by *amici*, even to be charged with distribution of child pornography is often tantamount to a death sentence. The right to assert an affirmative defense offers no relief from the stigma that would undoubtedly attach to a business publicly charged with violating the CPPA. Thus, the potential chilling effect of the CPPA on such mainstream businesses is substantial.

CONCLUSION

For the aforementioned reasons, *amici* urge the Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — THE *AMICI*

The Association of American Publishers, Inc. (AAP) is the national association in the United States of publishers of general books, textbooks and educational materials. The AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

The American Booksellers Foundation for Free Expression (ABFFE) was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and to establish legal precedent for the freedom to read on behalf of all citizens.

The International Periodical Distributors Association is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

Appendix A

Magazine Publishers of America (MPA) is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people.

The Publishers Marketing Association (PMA) is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade.

The Video Software Dealers Association is the trade association for the home video entertainment industry. It represents more than 3,500 member-companies in North America and 22 countries worldwide, including small, independently owned video retailers as well as large video chains. It also includes the home video divisions of all the major and independent motion picture studios, and the other associated businesses that comprise the home video industry.